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ABSTRACT

This study examines the tension between federal copyright law, which is exclusively enforced for federal courts, and the Eleventh Amendment, which generally prohibits federal courts from entertaining citizen suits brought against a state. The first of four parts of the report describes recent court decisions on copyright infringement by states which prompted the request for the Copyright Office to conduct this study. The second part describes the materials in 44 public comments received in response to a Copyright Office Request for Information on states' immunity from suit for money damages in copyright infringement cases that was published in the Federal Register. The legal interpretation of the Eleventh Amendment, which makes up the major part of the report, is presented in the third part. This interpretation is divided into three subsections: the historic development of Eleventh Amendment law; the Eleventh Amendment in the twentieth century; and application of the Eleventh Amendment in copyright infringement suits against the states. In the fourth part, it is concluded that, although Congress intended to hold states responsible under federal copyright law, the present state of the law will not be sufficiently clear on how the appropriate remedy against states can and will be secured for copyright owners until certain points of law have been decided in currently pending litigation. Appended materials include a copy of the Request for Information, a discussion of the English common law concept of sovereign immunity, and a Congressional Research Service report on the waiver of Eleventh Amendment immunity in individual states. (EW)

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The Register of Copyrights
of the
United States of America

Library of Congress
Department 100
Washington, D.C. 20540

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June 27, 1988

The Honorable
Robert W. Kastenmeier
Majority
Subcommittee on Courts, Civil
Liberties and the Administration
of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

The Honorable
Carlos Moorhead
Minority
Subcommittee on Courts, Civil
Liberties and the Administration
of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Kastenmeier and Mr. Moorhead:

I have the honor to submit to you a Report on the Copyright Liability of States and the Eleventh Amendment. As you requested in your letter of August 3, 1987, I have conducted a factual inquiry about enforcement of copyright against state governments and about unfair copyright licensing practices, if any, with respect to state government use of copyrighted works. I have also prepared an in-depth analysis of the current state of Eleventh Amendment law and the decisions relating to copyright liability of states, including an assessment of any constitutional limitations on Congressional action. Finally, as you requested, the American Law Division of the Congressional Research Service has conducted a 50 state survey of the statutes and case law concerning waiver of state sovereign immunity.

I would be pleased to respond to any requests for elaboration of any part of the report.

Sincerely,

Ralph Oman
Register of Copyrights

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August 3, 1987

OFFICE OF REGISTER
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Ralph Oman, Register of Copyrights
Copyright Office
Library of Congress
Washington, DC 20559

Dear Ralph:

On behalf of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, I wish to request your assistance with respect to the interplay between copyright infringement and the Eleventh Amendment. As you know, there have been a number of court cases in recent years which have addressed this question.* To completely assess the nature and extent of this problem, I would like to ask the Copyright Office to complete the following tasks:

(1) to conduct an inquiry concerning the practical problems relative to the enforcement of copyright against state governments;

(2) to conduct an inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state government with respect to copyright issues; and

(3) to produce a "green paper" on the current state of the law in this area and an assessment of what constitutional limitations there are, if any, with respect to Congressional action in this area.

In making this request I anticipate that you may wish to consult with other segments of the Library of Congress. For example, a 50 state survey of the statutes and case law concerning waiver of sovereign immunity can be most easily done by the experts in the American Law Division. I would encourage you to utilize these other resources within the Library.

---

* Copyright and the Eleventh Amendment, 40 Vanderbilt L. Rev. 225 (1987).

In light of the relative complexity of the tasks envisioned by the letter, I will work together with you to agree on a mutually satisfactory work plan and time schedule.

Thank you in advance for your cooperation in this request. I look forward to working with you and your excellent staff.

With warm regards,

Sincerely,

Bob Kastenmeier

Carlos J Moorhead

ROBERT W. KASTENMEIER
Majority
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

CARLOS MOORHEAD
Minority
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

COPYRIGHT LIABILITY OF STATES

AND THE ELEVENTH AMENDMENT

JUNE 1988

A REPORT OF
THE REGISTER OF COPYRIGHTS

UNITED STATES COPYRIGHT OFFICE
THE LIBRARY OF CONGRESS

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ACKNOWLEDGEMENTS

A report of this kind is the product of the diligence, skill, and knowledge of many staff members working under my direction. Many people contributed suggestions to the report at various stages of its preparation including the review of the final drafts. I am grateful for the contribution of all staff members at every stage, from early planning and research to final editing and reproduction of copies.

I would like to note and make special mention of Andrea Zizzi and Elliott Alderman, Senior Attorney Advisers in the General Counsel's Office, for their major contribution to the research and writing of the report. I would also specially mention the secretarial contribution of Ruth Goddard of the General Counsel's Office.

EXECUTIVE SUMMARY

Part I -- INTRODUCTION

The introduction to this study describes the tension between the federal copyright law, which is exclusively enforced by federal courts, and the Eleventh Amendment, which generally prohibits federal courts from entertaining citizen suits brought against a state. In recent years that tension became more apparent as federal district courts in five states have found state governments immune from suit for money damages in copyright infringement lawsuits, based on an application of recent Supreme Court decisions in other Eleventh Amendment cases not involving the Copyright Act.

The introduction also describes how these decisions, which left copyright owners without a traditional copyright remedy against infringing states, prompted the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary to request the Copyright Office to assess the nature and extent of the clash between the Eleventh Amendment and the federal copyright law. As a part of that inquiry, the Subcommittee specifically instructed the Copyright Office to conduct an inquiry concerning whether copyright enforcement problems have arisen because of states' immunity, and whether states have found that copyright owners engage in unfair business practices regarding their copyrights. Finally, the Subcommittee requested that the Copyright Office secure the assistance of the Congressional Research Service to conduct a fifty state survey of state laws in order to identify whether particular states have waived their common law sovereign immunity and/or Eleventh Amendment immunity in copyright infringement cases.

This report represents the culmination of the efforts of the Copyright Office and the Congressional Research Service to fulfill the Subcommittee's request.

Part II -- FACTUAL INQUIRY -- THE COPYRIGHT OFFICE REQUEST FOR INFORMATION

Part II of the study describes the Request for Information the Copyright Office published in the Federal Register to solicit public comment on the issue of states' immunity from suit for money damages in copyright infringement cases. The Office specifically sought information as to: 1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers; and 2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials.

The report describes the materials in the forty-four comments the Office received from the public. In answer to the first question, the comments almost unanimously chronicled dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits. The major concern of copyright owners is a fear of widespread, uncontrollable copying of their works without remuneration. Five commentators document actual problems faced in attempting to enforce their copyrights against state government infringers.

In answer to the second question, the comments did not reflect a single complaint regarding unfair copyright or business practices by copyright owners with respect to state governments' use of copyrighted materials. Copyright owners denied knowledge of such abuses, and declared the irrelevancy of the existence of such possible abuses with respect to the issue of state immunity, arguing that if such abuses do exist, wholesale immunity is not the solution to such problems. Finally, one commentator argued that, in fact, in the highly competitive industry of educational publishing, state agencies are in a more powerful position than publishers and are able to exact substantial concessions in negotiating copyright contracts with publishers.

The report also describes why copyright owners found injunctive relief, which would be the only remedy available in copyright infringement cases against states if states have Eleventh Amendment immunity, is inadequate as a deterrence to copyright infringement.

Part III -- LEGAL INTERPRETATION OF THE ELEVENTH AMENDMENT

Part III of the report represents the Copyright Office's analysis of the body of law that interprets the Eleventh Amendment. Because the Supreme Court's modern day pronouncements about the meaning of the Eleventh Amendment are complex, often contradictory, and in some cases baffling, the Copyright Office examined the Amendment in its historic context.

The first section of Part III examines the historic development of Eleventh Amendment law, beginning with the events leading to passage of the Eleventh Amendment. The report details the limited extent to which the members of state constitutional conventions debated the issue of whether and to what extent Article III of the draft Constitution incorporated common law sovereign immunity for states. The report concludes that at the time the Constitution was ratified, there was no firm consensus concerning the extent to which the judicial power of the United States granted by Article III extended to citizen suits against states. The report then discusses the early landmark case of Chisholm v. Georgia, in which the first Supreme Court to sit held that Article III permitted a citizen of another state to sue a state in federal court for the state's repudiation of its Revolutionary War debts. That decision created a political furor that threatened the stability of the new nation, and resulted in a hurried enactment of the Eleventh Amendment.

The report details the narrow construction given the Eleventh Amendment by the Supreme Court under Chief Justice John Marshall and its later expansion in the late 1800's, which culminated in the Hans v. Louisiana case. That case interpreted constitutional immunity to apply even in suits outside the literal terms of the Eleventh Amendment, brought by a citizen against his own state. The Court based its decision on a novel reading of the framers' intent.

The second section of Part III follows the development of the Amendment in the twentieth century. It describes how the Court adopted in Ex Parte Young the legal theory that a suit against a state official for injunctive relief is not a suit against a state, to mitigate the somewhat harsh result of the Hans expansion of the reach of Eleventh Amendment immunity. It also relates how in the mid-twentieth century the Supreme Court for a brief period refined another theory to avoid a finding of a defendant state's immunity from suit: the theory of a state's express or implied waiver of Eleventh Amendment immunity.

Finally, the report describes the Court's recent adoption and refinement of the theory that Congress, when acting pursuant to its legitimate Fourteenth Amendment power (or perhaps its other plenary powers), may provide for private suits against states or state officials which are constitutionally impermissible in other contexts. In other words, the theory provides that Congress may, in some circumstances, abrogate states' Eleventh Amendment and/or common law sovereign immunity.

The modern standard governing when Congress may so abrogate states' immunity is set out in Atascadero State Hospital v. Scanlon: first, Congress has the authority to abrogate immunity in circumstances in which "the usual constitutional balance between the States and the Federal Government does not obtain," such as circumstances relating to the Fourteenth Amendment; second, Congress must demonstrate its intention to abrogate states' immunity in a particular statute by drafting the statute specifically to include states in the defendant class. The report points out that the United States v. Union Gas case is currently pending before the Supreme Court. That case specifically raises the issue of whether Congress may abrogate states' Eleventh Amendment immunity pursuant to its legitimate Article I powers.

To augment the review of Eleventh Amendment case law in the twentieth century, the report contains a brief summary of modern interpretations of the meaning of the Eleventh Amendment offered by law review commentators as well as individual Supreme Court Justices.

In the last section of Part III, the report describes how courts have applied the Eleventh Amendment in copyright infringement suits against states. The report describes how at the height of the implied waiver theory, there was a split between the United States Circuit Courts of

Appeal on the issue of whether states can be sued in federal court for copyright infringement. It also notes that since the Supreme Court decided the Atascadero case, the five district courts specifically addressing the issue have decided in favor of states' immunity from suit for damages in copyright infringement cases. This result is based on each court's legal finding that Congress did not express clearly in the language of the Copyright Act its intention to abrogate the Eleventh Amendment according to the rigorous Atascadero standard announced in 1985. The courts did not raise the possibility that Congress might not have the authority under Article I to abrogate states' immunity.

The report notes that as of the time of its writing, Eleventh Amendment copyright cases are pending on motions for summary judgment before the Fourth and Ninth Circuits.

Part IV -- CONCLUSION

In Part IV, the Copyright Office concludes that Congress intended to hold states responsible under the federal copyright law, and that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court for money damages. However, the report points out that the present state of the Eleventh Amendment law will not be sufficiently clear on how the appropriate remedy against states can and will be secured for copyright owners until certain points of law have been decided in currently pending litigation.

First, the Supreme Court's resolution of the Union Gas litigation will decide the issue of whether Congress has the authority, pursuant to its plenary powers under Article I, to abrogate states' Eleventh Amendment immunity. Second, assuming Congress does have that authority, the Fourth and Ninth Circuit Courts of Appeal, and perhaps ultimately the Supreme Court, must decide whether in the Copyright Act Congress met the Atascadero test by expressing in the clear language of the statute its intent to abrogate states' immunity.

Five district courts have decided that Congress did not meet the Atascadero test in the Copyright Act and, therefore, states are immune from copyright infringement suits for damages. However, as copyright owners point out, in their application of the Atascadero clear language test, those courts did not look at the statute as a whole to determine Congress' intent but, rather, merely looked to the Copyright Act's definition of the defendant class for infringement suits. The Seventh Circuit in the McVey Trucking case took the position that Atascadero permits a court to look at the statute as a whole for determining Congressional intent to abrogate states' immunity. If the Fourth and/or Ninth Circuit and ultimately the Supreme Court agree with McVey Trucking, then those courts could easily find that in the Copyright Act Congress clearly expressed its intent to abrogate states' immunity, by virtue of the Act's specific exemptions directed at government users of copyrighted works for some but not all uses.

Based upon the foregoing considerations, the Copyright Office makes the following recommendations to Congress for insuring that Congress' intent to make states liable under the federal copyright law is realized:

Recommendations

1. If Union Gas permits Article I abrogation, Congress should amend section 501 of the Copyright Act to clarify its intent to abrogate states' Eleventh Amendment immunity pursuant to its copyright clause power and thereby make states liable to suit for damages in federal court for copyright infringement. A legislative solution is preferred since this action would merely confirm Congress' original intent about the states' amenability to damage suits under the federal Copyright Act. Legislative action will also avoid needless litigation and delay in clarification of the copyright law.

2. If Union Gas does not permit congressional abrogation under Article I powers, Congress may be forced to amend the jurisdictional provision in 28 U.S.C. §1338(a), to provide that where states are defendants private individuals may sue them in state court for copyright damages under the federal copyright statute.

APPENDICES

Appendix A reproduces the Copyright Office Request for Information and provides a list of the commentators who responded to the notice.

Appendix B provides a discussion of the derivation of the Eleventh Amendment from the English common law concept of sovereign immunity, and a review of the history of the English law in that area.

Appendix C is the Congressional Research Service Report entitled Waiver of Eleventh Amendment Immunity From Suit: State Survey Relating to Copyright Infringement Claims." In its own Executive Summary, the Congressional Research Service describes the results of its fifty state survey as follows:

> Express state waiver is to be determined under state law. Since state governments seldom deal explicitly with the eleventh amendment, waiver of eleventh amendment immunity is generally the product of the federal courts' construction of state law. However, a few states, Indiana, Nevada, and Pennsylvania, expressly direct that nothing contained in their statutes is to be construed as a waiver of eleventh amendment immunity.
>
> Federal courts may discover state waiver of immunity in state constitutions, state legislation, or state court decisions. In our survey of the states, the constitutions of Alabama, Arkansas, and West Virginia address the immunity issue in the most restrictive manner. Those state constitutions direct that the states shall never be made defendant in any court of law or equity, which includes both federal and state courts.
>
> Twenty states constitutionally empower their state legislatures to specify the procedures and requirements for private suits against the state. These constitutional provisions generally do not waive eleventh amendment immunity or sovereign immunity absent additional legislation.
>
> Legislatures that authorize suits against their states have adopted various procedural and substantive restraints. Most restraints explicitly restrict suits against the state to certain state courts and to particular types of actions. These special tribunals and types of actions are indicated in the survey.
>
> Included in the survey are opinions issued by state Attorneys General which interpret the Copyright Act to provide guidance for a state and its agencies. The attorney general's authority to waive the state's immunity is usually lacking as many states have an antiwaiver policy in their constitutions or statutory provisions.

The CRS study reveals that none of the fifty states in their state constitution, state laws, or state court decisions, expressly waives Eleventh Amendment immunity from suit for damages in federal court in copyright infringement cases.

I. INTRODUCTION

Section 106 of the Copyright Act of 1976, Title 17 of the United States Code, grants copyright owners certain exclusive rights in their works. Although federal courts have exclusive subject matter jurisdiction over cases concerning the federal copyright law pursuant to section 1338(a) of Title 28 of the United States Code, the Eleventh Amendment to the Constitution generally prohibits federal courts from entertaining damage suits brought against a state by citizens of another state or country, and the Supreme Court has extended the principle of sovereign immunity to prohibit suits against a state by its own citizens.

This inherent tension between the federal copyright law and the Eleventh Amendment has emerged in recent years in copyright litigation. In copyright infringement suits brought against allegedly infringing states, the legal issue presented was whether Congress, in enacting the Copyright Act of 1976 under the copyright clause of the Constitution, has subjected the states to copyright liability under the Eleventh Amendment.

Although this particular issue is not a new one to the copyright community, the body of law that interprets the Eleventh Amendment and defines how the Amendment affects the amenability of states to suit pursuant to valid Congressional enactments has developed in recent years in a way that has affected copyright owners' ability to enforce their claims against states. 1/ In a recent line of copyright infringement cases

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1. Compare Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979) (states not immune to copyright damage suits under the Eleventh Amendment) with BV Engineering v. UCLA, 657 F.Supp. 1246 (C.D. Cal. 1987) (states immune under the Eleventh Amendment).

against states applying recent Supreme Court decisions in other Eleventh Amendment cases (not involving copyright law) federal district courts in five states have found state governments immune from suit for money damages in copyright infringement lawsuits. [2]

By letter dated August 3, 1987, the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary requested that the Copyright Office completely assess the nature and extent of the clash between the Eleventh Amendment and the federal copyright law. As a part of this assessment, the Subcommittee specifically instructed the Office to conduct the following inquiries: 1) an inquiry concerning the practical problems relative to the enforcement of copyright against state governments, and 2) an inquiry concerning the presence, if any, of unfair copyright or business practices vis-a-vis state governments with respect to copyright issues.

In response to this request, the Copyright Office, with assistance from the Congressional Research Service of the Library of Congress, conducted a legal and factual study of Eleventh Amendment/copyright issues. The study was divided into three parts:

1. A factual inquiry concerning the two specific issues raised by the Subcommittee;
2. A legal and historical analysis of the Eleventh Amendment and application of the Eleventh Amendment in copyright infringement suits against states; and

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2. BV Engineering, supra, note 1; Mihalek Corp. v. Michigan, 595 F.Supp. 903 (E.D. Mich. 1984), aff'd on other grounds, 814 F.2d 290 (6th Cir. 1987); Cardinal Indus. v. Anderson Parrish Ass'n, No. 83-1038-Civ-T-13 (M.D. Fla. Sept. 6, 1985), aff'd 811 F.2d 609 (11th Cir. 1987); Richard Anderson Photography v. Radford Univ., 633 F.Supp. 1154 (W.D. Va. 1986); Woelffer v. Happy States of Am., Inc., 626 F.Supp. 499 (N.D. Ill. 1985).

3. A fifty state survey of state laws seeking to identify laws that indicate whether a state waives its common law sovereign immunity and/or Eleventh Amendment immunity in copyright infringement cases.

The Copyright Office published a Request for Information in the Federal Register to elicit public comments, views, and information for the legal analysis and factual inquiry that would comprise the first two parts of the study. [3] At the recommendation of the Subcommittee, the Office requested the Congressional Research Service to conduct the fifty-state survey that would comprise the third part of the study. This report represents the culmination of the efforts of the Copyright Office and the Congressional Research Service to fulfill the request of the Subcommittee.

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[3] 52 Fed. Reg. 42045 (Nov. 2, 1987).

II. FACTUAL INQUIRY: THE COPYRIGHT OFFICE REQUEST FOR INFORMATION

A. Overview.

On November 2, 1987, the Copyright Office published in the Federal Register, a Request for Information soliciting public comment on "the issue of states' Eleventh Amendment immunity from suit for money damages in copyright infringement cases." [4] Specifically, the Office sought public comment, views and information as to "1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers; and 2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials." [5]

Forty-four comments were received, including one duplicate, two comments from the same party, and several addenda to a particular submission. Except for several comments filed by states and their entities -- California, Massachusetts and Virginia [6] -- the comments almost uniformly chronicled dire financial and other repercussions flowing from state Eleventh Amendment immunity from damages in copyright infringement

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4. Id.

5. Id.

6. The Chief of the Pennsylvania Department of Corrections' Activities Division indicated that a fee is paid for the public performance of videotaped films in state prisons. The Pennsylvania Department of Public Welfare does not pay a similar fee for showings in mental hospitals. State Library of Pennsylvania at 1.

suits. One commentator compared according Eleventh Amendment immunity to the grant to states of a compulsory license to exercise all of a copyright owner's rights, gratis. [7]

Complaints of unfair copyright or business practices by copyright proprietors were conspicuously lacking. Indeed, one company declared that in the highly competitive industry of educational publishing, state agencies are able to exact substantial concessions of basic intellectual property rights. [8] Another organization stated that it has no knowledge of any unfair practices, and has even allowed modifications to its own standard contracts for certain state schools. [9]

The major concern of copyright owners appears to be widespread, uncontrollable copying of their works without remuneration: 19 parties worried that with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them.

Eleven parties distinguished between damages and injunctive relief, and maintained that the latter is neither an adequate remedy nor a deterrent. Six stated that small companies do not have the resources to battle states. One warned that if immunity is applied to foreign works, it would provoke retaliation by United States trading partners and impede efforts to get better protection abroad.

Other reported consequences of state immunity would be: companies would not market to or would closely monitor their sales to states (nine comments); [10] prices of products to users other than states would likely increase (three comments); the rights of third parties would be violated, particularly with databases and permission fees paid to authors (four comments); the economic incentive and ability to create would be diminished (five comments); and, finally, the free use of copyrighted works would cause a loss of market intelligence and might lead to crippling product liability suits from unauthorized users who had received no update or other support services.

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[7] Information Industry Association ["I.I.A."].

[8] Harcourt Brace Jovanovich, Inc. (Richard Udell) ["H.B.J. (Udell)"].

[9] American Society of Composers, Authors and Publishers ["A.S.C.A.P."].

[10] But see SESAC, Inc. at 23: "In nearly a decade of licensing under

B. Discussion.

Five copyright proprietors document actual problems faced in attempting to enforce their claims against state government infringers.

A Tennessee attorney, [11] stated that he represented a small business [12] which markets its educational material to state and federal government agencies. His client provided a training video to a Texas federal prison to solicit sales. Officials of the prison made a copy and returned the original without payment. The client fears a similar problem with other state institutions.

A trade association [13] noted that it has had problems with state correctional institutions publicly performing motion pictures without authority. After being told that they are infringing, most states agree to

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the 1976 Copyright Act, never has any State agency raised the claim Eleventh Amendment immunity as a reason for not entering a SESAC performance license." (Emphasis in original).

[11] Law Offices of Alan Ruderman.

[12] The name of the client is not mentioned.

[13] Motion Picture Association of America ["M.P.A.A."].

get public performance licenses, some continue unauthorized performances, pending review, and at least two states - North Carolinia and Wisconsin - have asserted Eleventh Amendment immunity.

Another company, which licenses performance rights for musical compositions, stated that in June of 1987, it dismissed an infringement action against a county college rather than incur the burden and expense of contesting the defendant's claim of Eleventh Amendment immunity [14] -- the very nature of unsettled Eleventh Amendment case law makes it expensive to sue and difficult to predict the success of a damage suit. [15]

A nursing publisher [16] had a similar problem with the Minnesota Department of Human Services. The company publishes a range of educational materials for nursing board review courses, patient education and continuing nursing education. Last year, it learned that a Minnesota nursing home associated with the Department of Human Services was operating an "information center," copying the company's and competitors' materials and offering them for sale. The company alerted its competitors and sought legal counsel. They were told that they could not seek damages because the "information center" was considered a state agency and was immune from suit under the Eleventh Amendment. The company could not afford to seek an injunction because it could not recover costs or attorney's fees. A position, it said, in which many other publishers of educational materials find themselves. [17]

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14. Broadcast Music, Inc. at 2 ["B.M.I."].

15. B.M.I.

16. The American Journal of Nursing Company.

17. Id. at 1.

The company also recently learned from a competitor that a local hospital association in California set up a free membership "lending library" which copies material. It is convinced that institutions like these are encouraged because of recent court rulings. [18] The comment closes with a recommendation that if "Congress concludes that the public interest will not permit an action for damages, there should at least be an amendment to permit the recovery of costs and attorney's fees incurred in seeking an injunction. [19]

Finally, a Massachusetts law firm submitted an October 31, 1985 ruling that the Commonwealth could not raise the Eleventh Amendment as a bar to a copyright infringement suit. [20]

The record includes no evidence of copyright proprietors engaging in unfair copyright or business practices. The seven comments which address this issue did not deny that there may be such practices but instead state that they have no specific knowledge of such incidents. Two comments declared that the existence of such problems has no bearing on state immunity, and argued that if such abuses by proprietors exist wholesale immunity is not the solution. [21] One comment stated that there should be no balancing test of competing legitimate interests for Eleventh

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18. *Id.* at 2.

19. *Id.* at 4.

20. Heesch & Kelly at 7. This ruling predated the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which fundamentally changed Eleventh Amendment jurisprudence. The Commonwealth of Massachusetts submitted a Memorandum of Law In Support Of Their Motion for Summary Judgment in the same proceeding, after the *Atascadero* decision, in which it argued that Eleventh Amendment immunity does apply. Commonwealth of Massachusetts, Lisa A. Levy, Assistant Attorney General.

21. McGraw-Hill, Inc. ["McGraw"]; M.P.A.A.

Amendment analysis. 22/ Two stated that there are no abuses by copyright proprietors because they want to encourage exploitation of their works 23/ and have even allowed variations in their standard business arrangements for state entities. 24/ Finally, a major publisher of educational materials noted that in the highly competitive textbook market contracts are usually favorable to state agencies because of the state's power to impose regulations on publishers as a condition to qualifying to bid for adoption contracts. 25/

The process by which state school boards review textbooks for content and suitability is known as "adoption." On the basis of the review, each state board develops a list of approved texts. If a publisher does not have a book on the list, it cannot sell any books to any school in the state. The adoption process occurs every four to six years, and if a publisher's books are not selected, it must wait until the next time. In addition to controlling access to state markets, this process also imposes strict limitations on price and quality of materials used in manufacturing. Educational publishing in the U.S. is closely tied to how states choose or

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22. Association of American Publishers, Inc. ["A.A.P."] and Association of American University Presses, Inc. ["A.A.U.P."].

23. The National Music Publishers' Association, Inc. ["N.M.P.A."], The Music Publishers' Association of the United States, Inc. "[M.P.A.U.S."] and The Songwriters Guild of America ["S.G.A"].

24. A.S.C.A.P.

25. H.B.J. (Udell) at 3. *Cf*. McGraw at 2-3. (For business reasons in this extremely competitive market, publishers accommodate reasonable requests to copy proprietary information from state agencies. And the purchaser of 25 or more copies of a book would be entitled to get free supplementary material -- a teacher's edition and skill and testing materials. A duplicating master would also be provided to facilitate copying of the skills and testing material. Finally, the industry typically yields slim profit margins and state immunity would cause a decline in the general quality and availability of educational materials.)

"adopt" books. Twenty-two states rely on the "adoption" process in the choice of textbooks. Sales in these states account for 48 percent of the market.

Far from being subjected to unreasonable demands by publishers, "state agencies are able to extract from or even impose on publishers substantial concessions of basic rights under the Copyright Act that ... go far beyond the borders of fair use, educational exemptions, or the educational guidelines incorporated in the legislative history." [26] The company continued:

> As a condition of sale publishers are often required to grant permission to schools to create translations of entire works for distribution to thousands of students, or to make recordings for all students not merely for visually handicapped students, or to permit revisions of portions of works for other special purposes. Schools expect permission to create literally thousands of copies of translations or thousands of audio cassettes or derivative works and they expect publishers to grant these permissions at no charge. [27]

In negotiating grants, the publisher attempts to prevent distribution of the resulting translation, recording or specially revised material outside the school district, to avoid the state becoming a distributor of the publisher's materials in other forms or media. [28]

Moreover, the percentage of revenue from state agencies has increased over the past several years as state governments have assumed a larger part of the federal government's responsibility for educational services. [29] One major educational publisher made over 40 percent of its

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26. H.B.J. (Udell) at 3.

27. Id.

28. Id.

29. McGraw at 1.

textbook sales directly to state educational agencies.[30] According to this company, the combination of state immunity and the small budgets of state-funded agencies will encourage the purchase of one or two copies of a work and the reproduction of the remainder.[31]

The publishers' trade association declared that in 1986, U.S. publishers received $1.4 billion from the sale of college and university textbooks.[32] A 1977 Department of Education Bulletin estimated that 77.4 percent of university and graduate student in the U.S. attend state run institutions. Assuming book usage is the same at public and private institutions, there are approximately $1.1 billion of book sales to entities with potential Eleventh Amendment immunity who can copy and severely erode the market.[33] The association also admonished that states could structure the ways in which local, municipal, and other subordinate units of government are created, funded, or do business to cloak them with state authority and immunize them from liability for copyright damages.[34]

Finally, another large publisher of educational materials warned of at least three negative consequences that will flow from granting state's immunity:

> 1. Wholesale copying by state university libraries of scientific journals and books.

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[30] *Id*. at 2.

[31] *Id*.

[32] A.A.P. and A.A.U.P.

[33] Id. at 3. *Cf*. Holt, Rinehart & Winston, Inc. (Bob Blevins) at 1 ["H.R.&W. (Blevins)"]. (Sales now total more than $1.5 billion with 89 percent made to states, public school districts and public schools.)

[34] *Id*.

2. The establishment of textbook copying mills by which literature anthologies can be created without paying permissions to authors and publishers.
3. The creation of "cut and paste" textbooks in which selections from different textbooks are put together to make up one textbook, thereby damaging author's (sic) and publishers' rights to present their works in the manner they see fit. [35]

Beyond the practical difficulty of bringing any lawsuit under the uncertain scheme of Eleventh Amendment jurisprudence, [36] a significant number of comments drew specific distinctions between the relative advantages of damage suits and the disadvantages of injunctive relief. [37] For most companies, particularly small ones, the cost of injunctive relief is prohibitive if there is no opportunity to collect damages for infringement. [38] Additionally, injunctions do not compensate for past infringements [39] and the erosion or destruction of markets. [40] Moreover, copyright infringement is difficult to detect, [41] a work may be used until an infringer is caught [42] and with use by immune entities, owners will need to devise systems to closely monitor customer behavior. 43/ One company also indicated that injunctive relief, in addition to being prohibitively expensive, is bad business: a seller would lose business if it brought a systematic series of lawsuits against its customers. 44/ Finally, the music industry maintains that the elimination of damage suits against states will be devastating to the industry. 45/ The lifespan of much of today's music is limited; by the time unauthorized use is discovered and an injunction obtained, the music has lost value and enjoining future use is of little worth. 46/ Under existing case law, the state's use of the music would be royalty-free -- it may not be sued for the income the music has earned or the losses sustained by the uncompensated use. 47/

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[35] Harcourt Brace Jovanovich, Inc. (Peter Jovanovich) at 1 ["H.B.J. (Jovanovich)"].

[36] B.M.I.

[37] Though recent decisions have held that the Eleventh Amendment is a bar to monetary relief against states, injunctive relief against state officers is still available under Ex Parte Young, 209 U.S. 123 (1908).

[38] Foundation Press, Inc.; Data Retrieval Corp.; West Publishing Company; American Journal of Nursing Company.

[39] A.A.P.; I.I.A.

[40] A.A.P.

[41] A.A.P.; I.I.A.

[42] Dun & Bradstreet, Inc.; A.A.P.; I.I.A.

A major licensor of performance rights in music presented additional shortcomings of injunctive relief. 48/ Because the performing right in a musical work does not furnish a tangible "product" which can be withheld from an unlicensed user, the only meaningful remedy is an after-the-fact infringement action for monetary damages. 49/

Furthermore, this licensor obtains evidence of infringement by monitoring users' performances at random times. Thus, the fact that a particular work is the subject of an infringement suit is a happenstance

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43. A.A.P.

44. McGraw at 2.

45. N.M.P.A. at 7.

46. Id. at 7-8.

47. Id. at 8.

48. A.S.C.A.P.

49. Id. at 7.

depending on what is being performed at the moment an unlicensed user is monitored. For that reason, the licensor does not ascribe monetary damages to particular works or members, but instead places them in a general fund to defray the costs of licensing and litigating, and each member authorizes the licensor to bring suit in his name for the benefit of the entire membership. [50]

Thus, this commentator claims, injunctive relief is not an adequate remedy because a court may award relief only against future performances of the particular works before it or of works of the particular copyright owner involved in the suit. To enjoin future performances of all works in the licensor's repertoire, the commentator asserts a class action on behalf of all members is necessary. This action is both more complex procedurally and more expensive to maintain. [51]

Enforcement of injunctive relief is also more difficult than for monetary damages. Execution of damages is simple, while execution of an injunction requires a motion for contempt and involves the additional expense of proving performances after the injunction is granted. Finally, injunctive relief is only awarded against specific individuals and not the state itself. If the specific individuals do not participate in further infringement by the state, the injunctive relief may be meaningless. [52]

One consequence of state immunity, according to eight comments, would be that companies could not economically market to states and their entities. [53] Another consequence could be that the subsidy to state

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50. Id. at 8.

51. Id. at 9.

52. Id.

53. Dun & Bradstreet, Inc.; McGraw; Houghton Mifflin Co.; Inmagic, Inc.;

entities would raise prices for other users. [54] Immunity might also diminish the economic incentive to create and reduce the quantity and quality of published works, [55] particularly in the educational publishing industry. [56]

Moreover, state Eleventh Amendment immunity must open up the potential for substantial product liability damage awards against information providers. Regardless of fault, and despite unauthorized use of their works and lack of compensation, providers could, it is argued, be liable to state entities. [57] Where a copyright proprietor has lost control of his work and lacks knowledge of its ultimate user, he cannot provide update and other support services usually given to authorized users. [58]

Finally, state immunity would negatively impact on the beneficial rights of certain third parties. For example, publishers of databases often are not the primary copyright holders of the material they publish. Third parties provide them with data on the condition that proprietary

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Dialog Information Services, Inc.; I.I.A.; I.B.M. Corporation and Data Times. However, SESAC, Inc. stated that it had never had a state agency raise Eleventh Amendment immunity as a defense for not entering into a SESAC performance license, so it might still market to them.

[54] Congressional Information Service, Inc.; Cambridge Information Group; Holt Rinehart & Winston, Inc. ["H.R.&.W."] and VU/Text Information Services, Inc.

[55] A.A.P.; West Publishing Company; Dialog Information Services, Inc. and I.I.A.

[56] Academic Press, Inc.; H.R.&W.; The Psychological Corporation; Harcourt Brace Jovanovich-College Division; McGraw and Houghton Mifflin Company.

[57] I.I.A.; Information Handling Services.

[58] Id.

rights in the material are honored as well as royalty and distribution agreements. 59/ Similarly, publishers pay authors reprint rights, called "permission fees," which extend only to a specific edition and do not permit reproduction in any other form or medium. 60/ Thus, publishers who are not compensated for state reproduction of educational material cannot pay royalty income to authors for use of their material. 61/

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59. Cambridge Scientific Abstracts; Dialog Information Services, Inc.; Information Handling Services.

60. H.B.J. (Jovanovich).

61. H.B.J. (Barnett), Houghton Mifflin Company, H.R.&W.

III. LEGAL INTERPRETATION OF THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. 62/

The meaning of these seemingly straightforward words has consistently generated controversy among politicians, legal scholars, and Supreme Court justices from the time of its conception until the present day. That the debate on that meaning is heated in many cases should come as no surprise, because the extent of "the judicial power of the United States" will determine in large part whether private citizens can make a state obey the other provisions of the United States Constitution and the laws of Congress passed pursuant to the Constitution.

The Supreme Court's modern day pronouncements about the meaning of the Eleventh Amendment taken as a whole are complex, often contradictory, and in some cases baffling. For instance, recent case law indicates a philosophical split in the Supreme Court regarding the scope of the Eleventh Amendment's proscription; the split is based on two different historic interpretations regarding the meaning of the Amendment. At least four Justices on the current Supreme Court favor a broad reading of the scope of the Amendment that is based upon an interpretation of the intent of the framers of the Constitution that was first offered as a legal rational in the famous Hans v. Louisiana case in 1890. To the contrary, the Supreme Court minority favors a narrower reading of the Amendment based upon the interpretation of the framers intent offered by Chief Justice John

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62. U.S. Const., amend. XI.

Marshall in a number of cases decided soon after the adoption of the Amendment. Because of these divergent historic interpretations of the Eleventh Amendment the Office determined that it was essential for purposes of this copyright study to step back and examine the Eleventh Amendment in its historic context. By so doing, we were able to analyze better the Supreme Court's modern interpretation of the Eleventh Amendment and, specifically, to apply that interpretation in the particular context of the copyright law.

The first question the Office attempted to answer is whether states enjoy common law sovereign immunity from suit in federal court in addition to the immunity granted by the Eleventh Amendment. Because discussion of sovereign immunity in American case law is inextricably entwined with discussion of states' Eleventh Amendment immunity, we do not attempt to answer that question. However, the inquiry resulted in a review of the English origins of common law sovereign immunity that may be useful to readers of this study. Accordingly, a discussion of the derivation of the Eleventh Amendment from the English common law concept of sovereign immunity is attached as Appendix B to this study.

The Copyright Office's legal interpretation begins with a section that describes the events leading to the passage of the Eleventh Amendment. It also follows the changes in the Supreme Court's interpretation of the Amendment in the nineteenth century in historic context to illustrate why it is unclear whether the framers of the Constitution considered sovereign immunity to be inherent in the Constitution as a whole, and more particularly in Article III, or whether sovereign immunity was first incorporated in the narrow and literal terms of the Eleventh Amendment.

The report then follows the development of Eleventh Amendment law in the twentieth century, describes the prevailing interpretations of the Amendment today, and describes how the courts are interpreting the Eleventh Amendment law in copyright infringement suits. Finally, in its conclusion in Part IV, the report targets the unresolved legal issues that, if and when addressed by the courts in currently pending cases, should provide the information necessary for ultimate resolution by Congress of the clash between the Eleventh Amendment and the Copyright Act.

A. Historic Development of Eleventh Amendment Law.

1. Events leading to passage of the Eleventh Amendment.

The question of state amenability to suit under the new federal system being established by the Constitutional Convention arose in only four of the state ratifying conventions. [63] The debate concerned the extent to which Article III, which provides federal court jurisdiction based upon both subject matter and diversity of citizenship, displaced the common law sovereign immunity existing under each state's own laws.

In the Pennsylvania debates, James Wilson, the drafter of Article III, defended the power given to the federal judiciary under the Constitution as a means for ensuring that state legislatures could not impede performance of the nation's obligations under treaties, for example, payment of state debts to Great Britain. [64] The minority opposition to the Constitution in Pennsylvania did not raise any issue as to the suability of states in federal court under Article III. [65]

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[63] Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1902 (1983).

[64] 2 The Debates in the Several State Conventions of the Adoption of the Federal Constitution 490 (J. Elliot ed. Philadelphia 1866 & photo. reprint 1941) (hereinafter "Elliot's Debates").

In Virginia, where large debts to the British and to certain shareholders in other states were expropriated by the state government, [66] public sentiment against Article III ran high. George Mason, opposing the new Constitution, argued that it would be disgraceful for claims of citizens of a state against another state to be tried before the federal court, because such suits would denigrate the sovereignty of the state. [67] Mason's comments, however, appear to be born from his specific concern about potential suits against Virginia concerning the British debts and shareholder claims from a major dispute over lands in the western portion of Virginia. [68] He proposed an amended version of Article III that would subject states to suit in federal court on a prospective basis, but bar such suits where the cause of action arose prior to ratification. [69]

Federalist James Madison responded to Mason's statements with assurances that, with respect to controversies between a state and citizens of another state, "[i]t is not in the power of individuals to call any state into [federal] court," and Article III merely represents federal jurisdiction over diversity suits brought by a state against a citizen. [70] The meaning of his comment has been much debated, and even at the time was

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65. *Id*. at 542-46.

66. 12 Va. Stat. 52 (W. Hening ed. 1823); 10 Va. Stat. 9 (T. Hening ed. 1822).

67. 3 Elliot's Debates, *supra* note 67, at 526-27.

68. Gibbons, *supra* note 63, at 1904.

69. 3 Elliot's Debates, *supra* note 67, at 530.

70. *Id*. at 529.

criticized by Patrick Henry as being "perfectly incomprehensible." [71] Federalist John Marshall defended Madison's interpretation. [72] It remains unclear whether the two men were merely referring to controversies requiring interpretation of state law, or were also referring to such controversies arising under federal law. However, given their Federalist philosophy and their desire to convince the states to ratify the Constitution, it would be logical to assume the former.

Virginia's Governor Randolph attempted to diffuse Mason and Henry's opposition to Article III suggesting that the Virginia land disputes posed no treaty violation that would trigger suit in federal court. [73] He chided his colleagues, "Are we to say that we shall discard this government because it would make us all honest?" [74] Ultimately the Virginia convention defeated an amendment similar to that suggested by George Mason and ratified the Constitution. [75]

The North Carolina convention engaged in a debate similar to the Virginia debate. [76] Interestingly, James Iredell, who was later the dissenting Justice in Chisholm v. Georgia, the decision which sparked enactment of the Eleventh Amendment, argued Article III was necessary to ensure the observance of treaties entered into by Congress pursuant to Article I. [77] At that earlier time in his career he made no mention of the possibility that states enjoyed sovereign immunity from suit in federal court.

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[71] Id. at 543.

[72] Id. at 555-56.

[73] Id. at 575.

[74] Id.

[75] Gibbons, supra note 63, at 1908.

[76] 4 Elliot's Debates, supra note 67, at 160, 164, 173, 210.

[77] Id. at 146, 160.

In New York the constitutional debates were battled in the press. Anti-federalists bemoaned that the federal court diversity suits permitted under Article III would humble a state by requiring it to answer to an individual in a court of law, and would interfere with pre-ratification contracts made by "parties contemplating the remedies then existing in the laws of the states." 78/

The Federalist Papers were written to persuade the New York convention in favor of ratification. In Number 81, Alexander Hamilton tried to persuade opponents to Article III that the Article would not permit a non-citizen assignee of a state's securities to sue the state in federal court for the amount of the debt:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a

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78. Federal Farmer, 14 The Documentary History of the Ratification of the Constitution 40-42 (Kaminski & Saladino, eds. 1983); 2 The Complete Anti-Federalist 429-31 (H. Storing ed. 1981). However, "Federal Farmer" acknowledged that "[I]t is proper the federal judiciary should have powers co-extensive with the federal legislature -- that is, the power of deciding finally on the laws of the union." 14 Documentary History at 40.

> nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. 79/

Although the Supreme Court later construed Hamilton's arguments to support the view that the framers of the Constitution believed state's common law sovereign immunity was embodied in the Constitution, 80/ clearly Hamilton addressed the meaning of Article III in the specific context of a state law contract dispute and not a question of federal law. 81/ That Hamilton believed that the power of the federal judiciary should be coextensive with the power of the federal legislature is evident throughout The Federalist Papers, particularly in Number 80. 82/

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79. The Federalist No. 81, at 512-13 (A Hamilton) (J. Cooke ed. 1961).

80. See Hans v. Louisiana, 134 U.S. 1, 12-13 (1890); Edelman v. Jordan, 415 U.S. 651, 660-62, n. 9 (1974). See also, infra note 175 and accompanying text.

81. The federal judiciary did not have original federal question jurisdiction until enactment of the Judiciary Act of 1875; after its enactment a contract dispute might be deemed a federal question under the contracts clause of the Constitution, and therefore such a case would be properly brought before a federal court unless Eleventh Amendment considerations prevailed. See infra notes 175-76 and accompanying text.

82. The Federalist, No. 80, at 535 (J. Cooke ed. 1961). ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number").

A close examination of the scant available data concerning the framers understanding with respect to the extent to which states retained their common law sovereign immunity after their ratification of Article III leads to the conclusion that there was no firm consensus concerning the extent to which the judicial power of the United States extended to states. Thus, interpretation of Article III and states' sovereign immunity would be one of the first tasks of the first Supreme Court.

In 1790, Secretary of Treasury Alexander Hamilton proposed that the federal government pay its Revolutionary War debt in full and assume the debts of its states. A program was adopted after a struggle, with Thomas Jefferson buying support by promising to locate the new nation's capital in the South. [83] In 1793, three years after establishment of the Supreme Court, it decided the landmark case of Chisholm v. Georgia. [84] The issue in Chisholm was straightforward: could a citizen sue a state in federal court? Robert Farquhar, a citizen of South Carolina, had supplied material to the State of Georgia during the Revolutionary War. During his lifetime, the state had failed to pay for the purchases. The executor of his estate, Chisholm, a fellow South Carolinian, sued Georgia in assumpsit for failure to pay as promised. Chisholm lost in lower federal court, then invoked the original jurisdiction of the Supreme Court over "all cases ... in which a state shall be a party." [85]

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[83] J. Orth, The Judicial Power of the United States, The Eleventh Amendment in American History, 18-19 (1987).

[84] 2 U.S. (2 Dall.) 419 (1793).

[85] U.S. Const. art. III, §2, cl. 2.

Edmund Randolph, Attorney General in President Washington's cabinet, argued the case before the Supreme Court not as a federal question (i.e. one arising under the Constitution by virtue of a state law impairing the obligation of contracts) but rather as one between a state and the citizen of another state. Based on its belief that the Court could not call a state to account, Georgia did not appear and presented no defense.

A majority of justices held that Georgia could be sued. In the English tradition, each opinion was rendered seriatim. Four justices -- Blair, Wilson, Cushing and Jay -- all believed that a state could be sued in federal court. Blair baldly declared that states may be sued in federal court by citizens of other states. Wilson noted that state sovereign immunity was a thing of the past, the people of the United States formed a nation. Cushing stated that "controversies" in the constitutional sense included actions in assumpsit. Under the Constitution, states were clearly liable to suit by other states of the Union or by foreign states, citizens or subjects. Jay, the Chief Justice, concurred that the action could be maintained.

The Chief Justice had been one of the American commissioners who had negotiated the Treaty of Paris with Great Britain, ending the Revolutionary War, and was later Secretary of Foreign Affairs under the Articles of Confederation. Jay reasoned that a national judiciary independent of the states was one of the principal benefits of the federal Constitution. 86/ Fairness and wisdom called for an end to the practice of one state being dependent on another to yield to that state or its citizens. 87/ But the main source of Jay's reasoning was his former role

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86. Orth, supra note 83, at 15.

87. 2 U.S. at 474.

as a diplomat - he considered the obligations of the United States among other nations and the former's responsibility to respect and obey other country's laws, as well as the inadvisibility of referring questions of debt payments to state courts, particularly delinquent ones. [88]

The sole dissenter, Justice Iredell, wrote that the Constitution extended judicial power to controversies between states and citizens of other states but did not specify what kinds of controversies would be included. No provision was made in the Judiciary Act of 1789 [89] for actions in assumpsit against states. Justice Iredell argued that although the Supreme Court was authorized to issue all writs "agreeable to the principles and usages of law," [90] since England would not permit assumpsit to lie against the sovereign, U.S. law should not permit states to be sued without clear Congressional authorization. That being the case, he argued, the Court lacked jurisdiction to hear the controversy.

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88. Orth, supra note 83, at 16. Jay considered provisions in the Treaty of Paris dealing with English merchants and American Tories. In that treaty, the Americans agreed that all creditors should be able to recover war debt and that the Continental Congress would recommend that states restore confiscated property. Most of the states had not restored the property, and some had even passed new laws making recovery more difficult. In 1802, after considerable struggle, the United States paid $2,664,000. to English claimants. Convention of Jan. 8, 1802, United States-Great Britain, 8 Stat. 196, T.S. No. 108; Act of May 3, 1802, ch. 49, 2 Stat. 192.

89. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Ironically, a modern view of the contemporaneous passage of the Judiciary Act is that the language of the statute comports with the majority rather than Iredell's view in Chisholm. The very language in the Act that the Supreme Court had original, but not exclusive, jurisdiction of controversies between a state and citizens of other states, suggested that lower federal courts also had jurisdiction to hear such cases. Orth, supra note 83, at 26-27.

90. Id., §14, 1 Stat. 81-82.

All Justices except Iredell based their decisions solely on the Constitution. The majority did not distinguish between federal question and diversity jurisdiction. Iredell would not hold the state liable in assumpsit but reserved judgment whether a state would be liable under federal law. [91]

The reaction to Chisholm among states was swift and furious. The Georgia House of Representatives, for example, passed a bill colorfully warning that any persons attempting to levy a judgment in the case "are hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged." [92] The populace was not content that states could be called into court and compelled to cure their indebtedness. And since the majority in Chisholm had relied on the Constitution itself for the basis of the holding rather than a statute, a constitutional amendment was required. [93] This was delayed only because Georgia was given the chance to put in an appearance, and final judgment was not entered until February 14, 1794. By March 4, however, both houses had proposed the Eleventh Amendment. By February 7 of the following year, the requisite number of state legislatures (the Union included 15 states, so approval by 12 was required) had acted favorably. A presidential proclamation lagged behind almost three years until January 8, 1798.

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[91] 2 U.S. (2 Dall.) at 434-35; W. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1057-58 (1983).

[92] Augusta Chronicle, Nov. 23, 1793. See also 1 C. Warren, The Supreme Court in U.S. History, 97, 100 (1922) (quoting contemporary newspapers).

[93] Congress may by a two-thirds majority propose amendments which become part of the Constitution when ratified by the legislatures of three-fourths of the states. U.S. Const. art. V.

Several versions of the amendment were proposed in Congress. The first was that "no state shall be liable to be made a party defendant [in federal court]." Two later versions tracked article III: "the judicial power shall not extend" and "the judicial power ... shall not be construed to extend" to certain private citizens' suits against States. [94] The third version was ultimately passed as the Eleventh Amendment.

The difference between the second and third versions, according to one view, suggests that the Amendment was intended to modify Article III directly by repealing one of its affirmative grants. Moreover, instead of addressing the Amendment to all citizens regardless of citizenship, as did the first proposal, the second and third versions address only out-of-state and foreign citizens, paralleling Article III's affirmative authorization of federal court jurisdiction in suits "between a state and citizens of another state" and "foreign ... Citizens or Subjects." The very narrowness of the Amendment's coverage and its close tracking of the affirmative authorization in Article III of the state-citizen diversity jurisdiction

> suggest strongly that rather than intending to create a general state sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of article III's jurisdictional grant - the state-citizen-diversity clause - that had led to Chisholm. [95]

In this view, the failure of the Eleventh Amendment to mention in-state citizens suggests that its drafters did not intend to reach federal question suits -- otherwise the drafting was imprecise. Reading the Amendment to forbid federal question suits results in the extremely unlikely construction that all suits by out-of-state citizens are prohibited regardless of the existence of a federal question, but at the same time suits against a state by state citizens are permitted only if a federal question exists. [96] If the intent was to prohibit federal question suits against the states, the drafters would have prohibited suits by all citizens, not merely those out of state. [97]

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[94] Fletcher, supra note 91, at 1060 (citations omitted).

[95] Id.

The Amendment's failure to mention suits in admiralty, which are neither in law nor equity, lends additional support for the construction that federal question suits are not addressed. The Amendment speaks only to suits in "law and equity." Admiralty was a crucial part of federal court jurisdiction at the time, and it is unlikely that the failure to mention admiralty was accidental. This suggests that the adopters did not intend to forbid suits in admiralty, just as the failure to mention in-state citizens suggests that they did not intend to forbid federal question suits. [98]

Finally, the words "to be construed" indicate that the Amendment focused on a problem of construction. The obvious problem was the state-citizen diversity clause, which the *Chisholm* court construed to include cases where the state was a defendant. The Eleventh Amendment required that the clause be construed to authorize federal court jurisdiction only when a state was plaintiff. [99]

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[96] *Id.*

[97] *Id.* at 1061.

[98] *Id.*

[99] *Id.*

2. Early Interpretations of the Eleventh Amendment.

An unsettled question after Chisholm was the effect of the Eleventh Amendment on the Constitution: was the Constitution altered or its original meaning merely restated? Resolution of this question would be crucial for later interpretations - if the Eleventh Amendment merely withdrew the power to sue a state based on the diversity jurisdiction which was permitted in Chisholm, then the Amendment would not bar federal question jurisdiction. On the other hand, if the Amendment restated some original common law sovereign immunity found in the Constitution, then suits against a state by its own citizens, even though not falling within the literal language of the Amendment, would also be barred. Almost a hundred years later, in Hans v. Louisiana, [100] the Court adopted the view that the Eleventh Amendment merely restated the original meaning of the Constitution.

At the beginning of the nineteenth century, the Federalists were slipping from power, and their final stronghold was the judiciary. Federalist policy favored strong central government, encouragement of industry, protection of property and a well-ordered society. [101] Chief Justice John Marshall was their able spokesman.

In 1803, Marshall's court held in Marbury v. Madison, [102] that the Supreme Court was the ultimate arbiter of the laws of the land, and thus could review acts of other branches of the federal government. The Federalist perspective of a strong central government clashed with the newly-passed Eleventh Amendment: the Amendment limited the jurisdiction of the national courts, inhibited judicial power and threatened the basis of the Federalist outlook. If federal courts had no jurisdiction over suits against states, they could not decide even questions of constitutionality. Not surprisingly, the Marshall court never found the Eleventh Amendment a bar in any important constitutional case. [103]

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[100] 134 U.S. 1 (1890); see Orth supra note 83, at 28-29.

[101] Orth, supra note 83, at 31.

[102] 5 U.S. (1 Cranch) 137 (1803).

Six years later, the Marshall court began a 70 year trend to narrowly define the reach of state Eleventh Amendment sovereignty. In United States v. Peters, [104] it held that a state could not assert the Eleventh Amendment on behalf of an individual merely because the state claimed an interest in the dispute. Even if mandamus affected the balance in the state treasury, the Amendment was not a bar.

The controversy in Peters stemmed from the Revolutionary War. Several U.S. merchant marine sailors who had been forced to work on a British ship, mutinied and seized the ship in 1778. Before the sailors could take the ship to a U.S. port, a Pennsylvania state vessel, in turn, took possession of it as a war prize. The ship was sold and the merchant marines were only paid one-fourth of the proceeds, the remainder deposited with the Pennsylvania treasurer. As was usual in those days, the funds were deposited in the treasurer's own account. At his death, in 1796, the funds were still in his estate. In 1801, the Pennsylvania legislature instructed the current treasurer to regain the money from the original treasurer's heirs. At the same time, one of the merchant marines sued the heirs in federal court. In 1803, a federal judge ruled in favor of the

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103. Orth, supra note 83, at 34.

104. 9 U.S. (5 Cranch) 115 (1809).

sailor and entered judgment for him. Pennsylvania would not honor the decision. In 1808, the sailor petitioned the Supreme Court for a writ of mandamus ordering the federal judge to execute the original judgment. The Court granted the writ in 1809.

The same year, a federal court held in United States v. Bright [105] that the Eleventh Amendment did not apply to disputes in admiralty. The court reasoned that, by its terms, the Amendment applied to suits in law or equity, and admiralty was a separate category. The Constitution distinguishes between "cases in law and equity" and "cases of admiralty and maritime jurisdiction." [106] Cases in admiralty were not included in the Seventh Amendment's guarantee of trial by jury in "suits at common law." [107] Finally, enforcement was easier in admiralty cases because the rem, usually a ship, is in the possession of the court, and the proceeding is in rem instead of against a person, in personam. [108] Thus, in admiralty, the court need not depend on the goodwill of the state to execute judgment. The Bright case did not receive a holding of the Supreme Court at the time, but was considered good precedent until it was overruled in 1921. [109] The question of power, i.e. whether a court could compel a state to accede to its judgment, would be a recurrent theme in the new democracy. [110]

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105. 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647).

106. U.S. Const., art. III, §2, cl. 1.

107. Waring v. Clarke, 46 U.S. (5 How.) 441, 459-60 (1847).

108. 24 F. Cas. at 1236.

109. See supra note 212 and accompanying text.

110. For example, during Reconstruction, when the legislative and executive will to rebuild the South failed, the judiciary was forced to break with Marshall's precedent and hold in a wide variety of

Cohens v. Virginia [111] involved Virginia's criminal conviction of its own citizens. The issue in the case was whether the Supreme Court had the jurisdiction to review a writ of error by which Virginia's citizens appealed the convictions. Since the "plaintiffs" in the appeal were citizens of the state being sued, the Amendment technically did not apply. The Commonwealth of Virginia argued that the Amendment prohibited foreigners and citizens of other states from prosecuting suits against a state, so that federal courts should not have jurisdiction over suits against a state brought by its own citizens. Otherwise, the anomalous result would be that states could be sued in federal court by their own citizens but not by foreigners or citizens of other states.

The Court held that the writ of error was not a suit against one of the states within the meaning of the Amendment. The state had prosecuted the citizens, who were merely carrying the matter to a higher court. Even if it were a new suit, however, the Amendment would not be a bar since the suit was not commenced or prosecuted by a citizen of another state. Marshall limited the Amendment to its narrowest, most literal reading, and was brutally honest about its origins in the financial worries of the new republic:

> It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty

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suits against states that the Court was without jurisdiction. Orth, supra note 83, at 58.

[111] 19 U.S. (6 Wheat.) 264 (1821).

> of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states. [112]

In Marshall's view, the Eleventh Amendment applied only to diversity cases. With respect to federal question cases, sovereigns may consent to be sued and the adoption of the Constitution amounted to consent for cases arising under the Constitution, laws and treaties of the United States. [113]

A few years later, a pair of detours were created to bypass the reach of the Eleventh Amendment. The Court in Osborn v. The Bank of the United States, [114] permitted suit against an officer of the State of Ohio who had violated the Constitution by collecting an illegal tax from a branch of the national bank. It held that the officer did not share Ohio's immunity because where jurisdiction depended on a party it was the party named in the record, and since a state cannot validly authorize an act contrary to the U.S. Constitution, any unconstitutional act must be an act of an individual. [115]

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[112] 19 U.S. (6 Wheat.) at 406-407.

[113] Orth, supra note 83, at 39.

[114] 22 U.S. (9 Wheat.) 738 (1824).

The party of record detour had only a four year lifespan, however, and was closed in the only decision during Marshall's tenure to accept Eleventh Amendment immunity. [116] In Governor of Georgia v. Madrazo, [117] the Court barred suit under the Amendment, holding that a state was the party of record where its chief magistrate was sued in his official capacity, though not in his own name. Madrazo did not break with Osborn, however, it only made the Osborn defense - that a state official is acting under a valid state law - a jurisdictional issue. [118]

The rule in Osborn was followed for fifty years. And in the twenty eight year tenure of Marshall's successor as Chief Justice, Roger B. Taney, the Eleventh Amendment was only cited in five cases and the Court never held that it was barred from extending jurisdiction. [119] In two dissenting opinions, the Taney court cited the Chisholm holding as the correct view of the Eleventh Amendment, in that the Amendment had altered the Constitution, not merely restated the original meaning. [120]

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[115] This reasoning is borrowed from the English common law notion that if a King can do no wrong, and a wrong has been done, someone else must have done it. See discussion, infra Appendix B, notes 9-17 and accompanying text.

[116] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[117] Id.

[118] Orth, supra note 83, at 41.

[119] Id. at 41-42. Livingston's Ex'x v. Story, 36 U.S. (11 Pet.) 351, 397 (1837); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657-731 (1838); McNutt v. Bland, 43 U.S. (2 How.) 9, 23 (1844); Luther v. Borden, 48 U.S. (7 How. 1, 55) (1849); Howard v. Ingersoll, 54 U.S. (13 How.) 381, 409 (1851).

Another clever ruse that was used to get around the Eleventh Amendment bar of an individual suing a state was attributed to a Massachusetts lawyer, later Supreme Court Justice, Benjamin R. Curtis, who suggested that bonds be assigned to foreign states. [121] This would circumnavigate the Eleventh Amendment since the Constitution extends judicial power "to controversies ... between a state ... and foreign states...." [122] The idea was not followed until 1934, then to no avail. [123]

3. *Reinterpretations of the Eleventh Amendment during the Reconstruction period and beyond*.

During the Reconstruction period and into the beginning of the twentieth century, the Supreme Court seemed to find the basis for barriers to suit against state officials in common law sovereign immunity. [124] The Northern victory in the Civil War resulted in three constitutional amendments, which were the first additions since 1804. The Reconstruction Amendments, thirteen through fifteen, were intended "to write the Northern war aims into the nation's basic law." [125]

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[120] *See Livingston's Ex'x v. Story*, 36 U.S. (11 Pet.) 351, 397 (1837) (Baldwin, J., dissenting); *Luther v. Borden*, 48 U.S. (7 How.) 1, 55 (1849) (Woodbury, J., dissenting).

[121] Orth, *supra* note 83, at 44-45.

[122] U.S. Const., art. III, §2, cl. 1.

[123] *Monaco v. Mississippi*, 292 U.S. 313 (1934).

[124] *See, e.g., Scranton v. Wheeler*, 179 U.S. 141 (1900); *Smyth v. Ames*, 169 U.S. 466 (1898); *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1893); *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891); *Rolston v. Missouri Fund Commissioners*, 120 U.S. 390 (1887); *Allen v. Baltimore & Ohio Railroad Co.*, 114 U.S. 311 (1884); *Board of Liquidation v. McComb*, 92 U.S. 531 (1875); *Davis v. Gray*, 83 U.S. 203 (1872).

[125] Orth, *supra* note 83, at 48.

The Thirteenth Amendment, ratified in 1865, abolished slavery in the United States. 126/ The Fourteenth Amendment, ratified in 1868, extended the reach of national law, and thus altered the federal/state power balance. Two significant sections of the Fourteenth were the first, which guaranteed rights of national citizenship: the protection of life, liberty and property from state deprivation without due process, and the right to equal protection of the laws; and the fifth, which authorized Congress to enforce the Amendment. Finally, the Fifteenth Amendment guaranteed the right to vote. 127/

The Reconstruction Act of 1867 128/ divided the Southern states into five military districts ruled by major generals, who were to reestablish loyal government in the South. The Civil Rights Act of 1866 129/ had been passed a year earlier, guaranteeing to all equal rights to life, liberty and property. To make sure the South granted these rights during Reconstruction, Congress enacted a series of enforcement bills, called force bills. Federal courts were given exclusive jurisdiction to ensure that the rights were enforced. 130/ The final Civil Rights Act in 1875 131/ was aimed at innkeepers, owners of public transportation, and public establishments.

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126. U.S. Const. amend. XIII, §1.

127. U.S. Const. amend. XV, §1.

128. Act of March 2, 1867, ch. 153, 14 Stat. 428.

129. Act of April 19, 1866, ch. 31, 14 Stat. 27. The Civil Rights Act of 1866 was buttressed in 1870 after ratification of the Fourteenth Amendment because of some doubt about the constitutionality of the former. Act of May 31, 1870, ch. 114, §16, 16 Stat. 140, 144.

130. Act of 1870, §8, 16 Stat. at 142.

131. Act of March 1, 1875, ch. 114, 18 Stat. 335.

The nature of judicial power changed with the introduction of important federal rights, and various statutes were passed permitting removal to federal court of cases started in state courts. 132/ The Judiciary Act of 1875 133/ was the first statutory grant of federal question jurisdiction. However, the realization of the goals of the new legislation was frustrated when two Southern states lost cases seeking to enjoin enforcement of the Reconstruction Acts. 134/

Southern war debt laid the foundation for testing Justice Marshall's earlier hypothesis that the Eleventh Amendment was anti-creditor oriented. 135/ The South bore the responsibility for rebuilding most of its society: social services, public education and internal improvements. State bonds were sold to raise capital, and Southern debt topped one hundred million dollars. Reconstruction was finally stopped by the presidential election of 1876. 136/ The next year, the Compromise of 1877 altered the balance of power between the South and the national government. Northern Republicans promised that Congress would pass no additional civil rights acts or force bills, and that the President would use no further military threats in the South. 137/

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132. Orth, *supra* note 83, at 50.

133. Act of March 3, 1875, ch. 137, §1, 18 Stat. 470.

134. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

135. *See supra*, note 112 and accompanying text.

136. Orth, *supra* note 83, at 53.

137. *Id.* at 55.

With the withdrawal of the Northern military presence, Southern resolve to follow the Reconstruction Amendments similarly vanished. The Supreme Court was likewise handcuffed, with no federal militia to enforce its orders, and began a slow retreat from the noble ideas that underlay the contemporary civil rights legislation. In 1883, the Court invalidated crucial provisions of the Civil Rights Act of 1875, holding that Congress did not have the power under the Fourteenth Amendment to reach racial segregation in private accommodations. 138/ Then in 1896, it upheld "equal but separate" railroad accommodations, 139/ reasoning that the Fourteenth Amendment addressed political, not social equality. The racial component of the Compromise of 1877 would stand for almost a century until the school desegregation decision in Brown v. Board of Education. 140/

After Reconstruction, there was an increasing number of plaintiff Southern bankholders with claims against states, particularly Louisiana and North Carolina, and Southern states were beginning to get home rule. 141/ North Carolina was the first to get home rule in 1870, and thereafter decided to repudiate its debt. With no executive and legislative support, courts were forced to dismantle Marshall court precedent and hold that they were without jurisdiction to entertain suits against states, even though the suits involved a significant federal question: states' impairment of the obligation of their contracts.

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138. Civil Rights Cases, 109 U.S. 3 (1883).

139. Plessy v. Ferguson, 163 U.S. 537 (1896).

140. 347 U.S. 483 (1954). See Orth, supra note 83, at 57.

141. Orth, supra note 83, at 58.

The trend toward protecting states did not begin in earnest until 1883; however, even before that time, courts awarded only injunctive relief, and not damages. Ten years earlier, before the sands began to shift, the Court held in Davis v. Gray [142] that it had jurisdiction to hear a request for injunctive relief against the Governor of Texas. A pre-Civil War Texas legislature had conditioned land grants to the Memphis, El Paso and Pacific Railroad on the completion of certain construction. A subsequent legislature had declared all such grants forfeited. The railroad asserted that the state's noncooperation rendered fulfillment impossible, and that the state could not constitutionally divest the grant. Suit was brought to enjoin the governor from seizing the land, and the circuit court rejected the state's Eleventh Amendment defense.

On appeal, the Supreme Court, construing Osborn, held:

> (1) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.
>
> (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.
>
> (3) In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case. [143]

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[142] 83 U.S. (16 Wall.) 203 (1873).

[143] Id. at 220.

On the merits, the Court accepted the railroad's excuse for nonperformance and enjoined the governor from interfering with the railroad's title.

In Railroad Co. v. Swasey, [144] the Court ducked the Eleventh Amendment issue before it. Some creditors had sued on construction bonds used to finance the building of the North Carolina Railroad. A federal circuit court had rejected North Carolina's challenge of jurisdiction, holding that the Eleventh Amendment did not apply where a state was not a party of record. North Carolina's assertion that it was a necessary party was also rejected by the lower court. The lower court had held that it could take jurisdiction without making the state a party because the property or agent was within the jurisdiction. In that circumstance, it reasoned, a court acts through the instrumentality of the property or agent. On this basis, the lower court had held that it had jurisdiction over the property, ordered an accounting and, in the event of North Carolina's failure to pay, the sale of its security. The Supreme Court dismissed the appeal on the ground that it was not final because the accounting had not been completed.

The Court again followed Osborn in Board of Liquidation v. McComb, [145] and held that the Eleventh Amendment was not a bar to compelling a public officer to perform a nondiscretionary duty when the nonperformance is required by an unconstitutional state law. This decision protected Northern bondholders from dilution of their investments in Louisiana bonds.

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[144] 90 U.S. (23 Wall.) 405 (1875).

[145] 92 U.S. 531 (1876).

In 1883, the tide turned with the resurgence of state protection. In Louisiana v. Jumel, [146] the Court upheld Louisiana's decision by state constitutional amendment to reduce the rate of interest on its consolidated bonds. A bondholder had sought to compel the state to order its auditor to pay interest on the bonds in accordance with earlier, more favorable, terms. Louisiana did not allow suit against itself in state court, and the Court held with little discussion that the Eleventh Amendment was a bar in federal court. Two Justices filed strong dissents: Justice Field declared that when a state is a borrower it becomes responsible as a corporation and even if suit against the state is not permitted, its officers are bound by the state's contracts; [147] Justice Harlan viewed the decision as a break with precedent dangerous to national supremacy. [148]

With Southern states defaulting on their debts with reckless abandon, and plaintiff-citizens being barred from the courthouse doors by the grim spectre of the Eleventh Amendment, a new avenue of relief had to be devised. Two Northern states, New Hampshire and New York, offered to fill the void by accepting assignment of Louisiana bonds and suing in their state names.

The Supreme Court closed this apparent loophole in New Hampshire v. Louisiana, [149] by holding that the Eleventh Amendment barred the court from hearing cases in which one state acts as a "mere collecting agent" [150] for citizens seeking relief against another state. According

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146. 107 U.S. 711 (1883).

147. 107 U.S. at 740 (Field, J., dissenting).

148. Id. at 746-47 (Harlan, J., dissenting).

149. 108 U.S. 76 (1883).

150. Id. at 89.

to the Court, American states had surrendered power to enforce a citizens' claims on joining the Union. Based on the Chisholm holding that the citizen of one state could sue another state in federal court, the Court inferred that the Constitution did not duplicate the right by allowing a state to sue on behalf of its citizens. Thus, the Court reasoned, when the Eleventh Amendment overturned Chisholm, citizens were left without either remedy. Moneylenders were incensed, and a resolution [151] was introduced in Congress to repeal the Eleventh Amendment; it went nowhere.

Two more cases drove the final nails into the coffin of federal supremacy. Cunningham v. Macon & Brunswick Railroad, [152] overturned the barely ten year old precedent of Davis v. Gray, and held that the plaintiff's suit against Georgia state officers and the state-owned railroad for the repudiation of an issue of railroad bonds was barred by the Eleventh Amendment because the state was an indispensable party. The plaintiff's suit, in Hagood v. Southern, [153] against state officers to compel receipt of scrip that the state had promised to accept in payment of state taxes was similarly barred.

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[151] The resolution also would have given Congress the power to provide "by appropriate legislation for the legal enforcement of the obligation of contracts entered into by any of the States of the Union." H.R. Res. 321, 47th Cong., 2d Sess., 14 Cong. Rec. 1356 (1883).

[152] 109 U.S. 446 (1883).

[153] 117 U.S. 52 (1886).

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Not all states, however, were successful in repudiating their debts. Virginia ended up paying its creditors because it had made the coupons that represented the interest on its bonds receivable as legal tender for the payment of state taxes and other obligations certain to occur. [154]

Virginia's debt structuring would prove to be an albatross. The legislature repealed the section of the Funding Act that made the coupons receivable for state taxes, but the repealing statute was held unconstitutional in Antoni v. Wright. [155] In that case, the tax collector was required by writ of mandamus to accept the coupons. The Commonwealth stopped issuing these consolidated bonds ("consols"), and in 1873 imposed a tax on the coupons, effectively reducing the interest rate. In Hartman v. Greenhow, [156] the Court held that the tax violated the contracts clause, not mentioning the Eleventh Amendment, and Virginia was once again compelled to accept the coupons.

The Court reversed its position two years later in Antoni v. Greenhow. [157] Bent on repudiating its debt, Virginia had passed two statutes making the coupons acceptable only for identification purposes and requiring taxpayers to pay their taxes in dollars then sue the state to force acceptance of the coupons. The Court upheld the legislation, believing that the owners were left with an adequate remedy and no contract was impaired. The Chief Justice reached the merits despite the Eleventh Amendment, but Justice Matthews - joined by three other Justices - offered an alternative rationale that denied jurisdiction. [158]

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[154] Orth, supra note 83, at 90.

[155] 63 Va. 296, 22 Gratt. 833 (1872).

[156] 102 U.S. 672 (1881).

[157] 107 U.S. 769 (1883).

The creditors emerged victorious in the next battle. In 1885, coupon advocate William L. Royall found the solution: Virginia creditors did not need a court order requiring the state to raise taxes and pay interests, nor did they need an order compelling the tax collectors to accept the coupons, all they needed was an order discharging their tax liability. [159] Thus, a taxpayer would tender coupons, knowing they would not be accepted, then when the tax collector levied on his goods for the delinquent taxes, the taxpayer would bring an action of detinue (a common law remedy for the return of personal property wrongfully withheld or detained) against the collector. [160] In the Virginia Coupon Cases, [161] the Court held there was no taxpayer delinquency in paying this way, and that the statute prohibiting the collection of coupons instead of dollars was unconstitutional. Thus, in following the law, the tax collector was not acting in his official capacity.

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[158] Id. at 783.

[159] Orth, supra note 83, at 98.

[160] Id.

[161] 114 U.S. 269 (1885).

Then, in another two year cycle, a temporary injunction was sought to block the Virginia attorney general and other state officers from suing taxpayers who tendered the coupons. The attorney general, Ayers, was imprisoned for contempt when he defied the order. The Supreme Court ordered his release in In Re Ayers, [162] and citing the Eleventh Amendment, disclaimed jurisdiction of the case.

The Virginia bond coupon history culminated in McGahey v. Virginia, [163] which provided unanimity on four points of law: Virginia had a binding contract with its bondholders under the Funding Act of 1971; the Virginia legislature had passed several statutes which unconstitutionally impaired the obligation of contracts; Virginia could not be sued by holders of bonds and coupons because of the Eleventh Amendment; and, finally, Virginia officers could not trouble taxpayers who paid taxes with coupons. [164]

In the other states of the Union the question remained: could bondholders get into federal court to complain about the states' impairment of the obligation of contract? [165] The Supreme Court responded negatively in a trio of cases. Bonds secured by a lien on stock owned by North Carolina had been authorized in 1855 to finance construction of the Atlantic & North Carolina Railroad. Bondholders sued, among others, the state treasurer, and asked a federal court to enjoin the railroad from paying dividends to the state, to appoint a receiver to collect dividends for bondholders, and to order the sale of stock if the dividends were insufficient. On facts all but identical to Swasey,[166] the Court in Christian v. Atlantic & North Carolina Railroad[167] would not similarly order an accounting and the sale of stock on the failure to pay. Although in Christian the state had mortgaged the stock, it had retained possession of it and the mortgagor was a sovereign state immune from suit.

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[162] 123 U.S. 448 (1887).

[163] 135 U.S. 662 (1890).

[164] Id. at 684.

[165] Orth, supra note 83, at 71.

The second case, North Carolina v. Temple,[168] decided the same day as Hans v. Louisiana,[169] barred a North Carolina resident from suing his state auditor to compel payment of long-overdue interest on special tax bonds. The suit against the auditor was held to be "virtually" a suit against the state.[170] Justice Harlan dissented from the holding that the suit could not be maintained against the auditor. In his view, the legislation impaired the obligation of the state's contract, and the suit against the officer to compel performance of his ministerial duties was not one against the state.[171]

Finally, the landmark case of Hans v. Louisiana[172] extended the literal language of the Eleventh Amendment to prevent a Louisiana citizen from suing his own state in federal court without its consent. Hans had sued Louisiana under the contracts clause[173] of the Constitution to

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166. 90 U.S. (23 Wall.) 405 (1875).

167. 133 U.S. 233 (1890).

168. 134 U.S. 22 (1890).

169. 134 U.S. 1 (1890).

170. 134 U.S. at 30.

171. Id. at 30-31 (Harlan, J., dissenting).

172. 134 U.S. 1 (1890).

173. U.S. Const., art. 1, §10.

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recover the amount of coupons annexed to Louisiana bonds that the state had sought to repudiate. The Court chose to follow Justice Iredell's reasoning in Chisholm and "former experience and usage" rather than the "letter of the Constitution" as did the majority of Justices in Chisholm. [174]

The Hans majority looked to history and endorsed Alexander Hamilton's philosophy in Federalist No. 81 that "contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will." [175] Significantly, the majority believed that the Eleventh Amendment was adopted to restate the original understanding of the Constitution, even though only seven years earlier in New Hampshire v. Louisiana, [176] the Court had reaffirmed the correctness of Chisholm's holding that the Eleventh Amendment had changed the original meaning. Indeed, the reasoning of New Hampshire v. Louisiana had been that because the Constitution provided a forum in which citizens could sue states on their own behalf, states had surrendered their rights as sovereigns on adopting the Constitution to collect debts from other sovereigns on behalf of their citizens.

Moreover, some consider the Hans majority's "original understanding" to be questionable: there were no new historical records discovered in the 1880's; Justice Bradley, the opinion's author, merely quoted Madison, Marshall, and Hamilton and ignored differing opinions in the Federalist and other original literature; he treated Iredell's dissent in *Chisholm* as constitutional opinion; and, perhaps most crucially, borrowed the key concept of sovereign immunity, not mentioned in the Constitution, from a dissent in *United States v. Lee* [177] - where the majority had upheld suit against federal officers - and stretched the federal government's immunity to the states beginning "the confusion that still prevails between federal and state sovereignty." [178]

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[174] 134 U.S. at 12.

[175] Id. at 13. Hamilton's philosophy was expressed, however, in the context of a dispute involving state law and not a federal question. See supra notes 79-82 and accompanying text.

[176] 108 U.S. 76 (1883). See Orth, supra note 83, at 74.

Finally, it is even questionable whether *Hans* is an interpretation of the Eleventh Amendment at all. One view is that the decision is actually an interpretation of Article III since the Amendment, literally read, does not address suits against a state by its own citizens, and accordingly cannot prohibit them. [179] From this perspective, *Hans* is an incorrect reading of Article III: extending judicial power to "all cases ... arising under the Constitution, laws, and treatises of the United States" [180] somehow excludes cases against states. [181]

Following *Hans*, in *United States v. North Carolina*, [182] the federal government, as trustee for approximately two hundred thousand dollars worth of North Carolina construction bonds, sued the state. North Carolina had paid the full principal and interest due on the bonds, but the United States government wanted interest for the time after maturity. Article III extends judicial power to "controversies to which the United

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177. 106 U.S. 196, 223 (1882) (Gray, J., dissenting).

178. Orth, *supra* note 83, at 75.

179. *Id*. at 76.

180. U.S. Const., art. III, §2, cl. 1.

181. Orth, *supra* note 83, at 76.

182. 136 U.S. 211 (1890).

States shall be a party." 183/ The Supreme Court accepted jurisdiction but denied the government the extra interest it claimed. With the federal government suing the state there was no fear on the part of the Court of rendering an unenforceable judgment. 184/

At the beginning of the twentieth century, a plaintiff finally won a judgment in a state bond case. In South Dakota v. North Carolina, 185/ the plaintiff-state had acquired its bond by gift. The holding in New Hampshire v. Louisiana 186/ was distinguished because South Dakota was suing on its own behalf and not for its citizens. North Carolina's bonds were secured by a mortgage on stock owned by the state, and the Court compelled a foreclosure proceeding.

After the Southern bond cases, there was a reassertion of federal judicial power, 187/ and business, particularly railroads, became the new favored child. The theory of state consent to suit gained prevalence as a means to avoid states' immunity from suit in federal courts. However, there was an inherent conflict in the consent theory concerning the interplay of Article III, the constitutional source of judicial power for federal courts, and the Eleventh Amendment which withdrew that power in suits against states: Article III courts cannot exercise jurisdiction in a case without the judicial power to hear the controversy, regardless of whether a party consents to suit. 188/ But this technicality did not

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183. U.S. Const., art. III, §2, cl. 1.

184. See Orth, supra note 83, at 77-78.

185. 192 U.S. 286 (1904).

186. 108 U.S. 76 (1883).

187. Orth, supra note 83, at 122.

188. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

bother the Court, and it held in *Gunter v. Atlanta Coast Line Railroad* [189] that a state can waive its Eleventh Amendment immunity.

The Court based its recurrent injunctions against state officers on the Due Process and Equal Protection clauses of the Fourteenth Amendment. [190] One remarkably prescient commentator noted that since the Reconstruction Amendments gave Congress enforcement power, Congress could give courts jurisdiction against states and their officers to enforce the Amendments. [191] This approach was followed years later in *Fitzpatrick v. Bitzer* [192] and *City of Rome v. United States*. [193]

At the turn of the century, the Supreme Court's agenda was dominated by issues concerning the government's power to regulate the economy. [194] In *Pollock v. Farmers' Loan & Trust Co.*, [195] the Court held that Congress did not have the power to enact a national income tax. The Constitution requires that direct taxes must be apportioned among states on the basis of population, [196] and precedent dictated that head and property

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189. 200 U.S. 273, 283-84 (1906). Accord *Clark v. Barnard*, 108 U.S. 436 (1883) (personal privilege of state may be waived at its pleasure); *Hans v. Louisiana*, 134 U.S. 1 (1890) (Eleventh Amendment linked to sovereign immunity, and at common law sovereign could consent to suit.)

190. *Smyth v. Ames*, 169 U.S. 466 (1898); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894). *But see* *Fitts v. McGhee*, 172 U.S. 516 (1899).

191. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 Colum. L. Rev. 183, 197 (1908).

192. 427 U.S. 445 (1976).

193. 446 U.S. 156 (1980).

194. Orth, *supra* note 83, at 128.

195. 157 U.S. 429 (1895).

196. U.S. Const., art. 1, §2, cl. 3; *id*. §9, cl. 4.

taxes were direct. The Court reasoned that income taxes were direct as well. Similarly, in Lochner v. New York, [197] a state law prohibiting the employment of bakers for more than ten hours per day or sixty hours per week was struck down as violative of the Due Process Clause of the Fourteenth Amendment.

In an attempt to overcome the Court's decidedly antiregulatory position, states attempted to shelter their regulatory acts behind the Eleventh Amendment. In Ex Parte Young [198] railroad stockholders sought a federal injunction against Young, the Minnesota attorney general, to prohibit him from enforcing certain railroad rates. Young argued that as an agent he shared the state's Eleventh Amendment immunity and could not be sued. The circuit court did not agree and issued a preliminary order enjoining Young from enforcing the law. Young violated the injunction by suing one of the railroads in state court, and the circuit court judge jailed him for contempt of court. Young filed a petition for habeas corpus, bringing the case to the Supreme Court, but unlike In re Ayers, the Court would not issue the writ. The Court then held that an unconstitutional statute strips the official character of the person enforcing it. [199] A state cannot authorize an unconstitutional act, so the official acts on his own and there is no immunity to share. [200]

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[197] 198 U.S. 45 (1905).

[198] 209 U.S. 123 (1908).

[199] Id. at 160.

[200] Accord Hunter v. Wood, 209 U.S. 205 (1908).

Public reaction to the notion of having a judge enjoin the governor and attorney general of a state, particularly because federal judges are protected by life tenure and are insulated from popular sentiment, was decidedly hostile. 201/ But the cases were tolerated because the Court feared that there would be no effective way to enforce the Constitution if sovereign immunity barred all injunctions against government officers. 202/ In any event, the underpinning of Ex Parte Young is arguably logical: if a state cannot constitutionally authorize an act then its agent cannot derive authority from the state's grant, thus he acts on his own. This may be compared to the corporate doctrine of ultra vires: the act of a company officer beyond his authority does not share corporate immunity. 203/

4. An exception to Eleventh Amendment immunity: cities and counties.

It was commonly understood at the time that the Constitution was ratified that the sovereign immunity of the states was not shared by their subdivisions. 204/ Sovereign immunity derived from the sovereign or quasi-sovereign status that only a state in and of itself was seen to possess, and not from the governmental functions that both the states and its subdivisions performed.

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201. Orth, supra note 83, at 130-31.

202. D. Currie, Federal Jurisdiction in a Nutshell 168 (2d ed. 1981).

203. Orth, supra note 83, at 133.

204. Fletcher, supra note 91, at 1100.

Interestingly, in the Chisholm v. Georgia opinion, Chief Justice Jay started from the proposition that a city did not possess the sovereign attributes that Georgia claimed for itself and argued that a state should be treated similarly. [205] In accordance with the same assumption, when, after the Eleventh Amendment was in effect, the courts were confronted with suits against cities and counties, whether based on diversity or federal question jurisdiction, they did not raise any jurisdictional objections.

During most of the nineteenth century there was no challenge to the general assumption that political and geographic subdivisions of states, such as cities and counties, were subject to suit in federal court. [206] It was not until 1890 that the Supreme Court was directly presented with the issue of whether the subdivisions of a state could share the state's Eleventh Amendment or common law sovereign immunity. In that year, the Court decided Lincoln County [Nevada] v. Luning, [207] a citizen suit against a county that defaulted on its bonds. The Court refuted arguments that cities and counties are subdivisions of states, created by state law to administer local government, and should therefore share in the states' Eleventh Amendment and common law sovereign immunity. Instead, the

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[205] 2 U.S. (2 Dall.) at 472-73.

[206] E.g., Mayor of New York v. Ransom, 64 U.S. (23 How.) 487 (1860); City of Providence v. Clapp, 58 U.S. (17 How.) 161 (1855); Sumner v. Philadelphia, 23 F. Cas. 392 (C.C.E.D. Pa. 1873) (No. 13,611). See Lee, The Federal Courts and the Status of Municipalities: A Conceptual Challenge, 62 Boston U. L. Rev. 1, 25 (1982).

[207] 133 U.S. 529 (1890).

Court found that cities and counties are parts of the state in only a "remote sense," and unanimously decided that a state's cities and counties did not share in either the state's Eleventh Amendment or common law immunity. [208] Thus, despite the Court's recent trend to expand the traditional scope of states' immunity, especially in bond cases, the Court continued to abide by the previously untested view that subdivisions of the states cannot partake in the sovereign immunity enjoyed by the states.

B. After Ex Parte Young: the Eleventh Amendment in the Twentieth Century.

The Ex Parte Young decision marks the maturation of the legal approach to the Eleventh Amendment that developed in the late nineteenth century and would become the basis for twentieth century interpretation of the amenability of states to suit in federal courts. [209] By that time, the Supreme Court in Hans v. Louisiana had adopted the theory that the Eleventh Amendment incorporates the principle of common law sovereign immunity, so its proscriptions apply not only to suits brought by citizens of other states or citizens of foreign countries against states, but also to suits brought by citizens of the state being sued. This theory assumed that Chisholm v. Georgia was incorrectly decided, that the Eleventh Amendment merely reinstated the original understanding of the framers and did not amend the Constitution, and that, therefore, at least to a certain extent, Article III of the Constitution does not extend jurisdiction to federal courts to hear those suits against states. This approach to the

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[208] Id. at 530.

[209] One commentator refers to the legal approach that developed at that time as a reconceptualization of the Eleventh Amendment that was followed at the expense of the original understanding. Orth, supra note 83, at 139.

Eleventh Amendment had a great impact on defining federalism as, after the Reconstruction Amendments were passed, the Court began applying Eleventh Amendment immunity in federal question cases, and not just cases based on diversity of citizenship.

The nexus between the Amendment and the common law sovereign immunity adopted in Hans allowed the law to develop in a way that mitigated somewhat the harshness of complete immunity for states. First, the Court in Ex Parte Young had partially reinstated Marshall's early interpretation in Osborn v. The Bank of the United States that, based on common law tradition, an officer of a state acting pursuant to an unconstitutional state law may not assert the state's immunity. However, based on the doctrine first pronounced in Governor of Georgia v. Madrazo, [210] suits that involve state property or ask for relief which clearly call for exercise of official authority, such as paying money out of the state treasury to remedy past harms, are considered suits against the state and not the officer. Thus, as of 1908, a person could sue in federal court to obtain injunctive relief against a state officer to prohibit future unconstitutional actions, but the Eleventh Amendment has barred an award of damages in a suit against a state officer. A second factor mitigating the harshness of complete immunity for states would develop in the twentieth century: the common law principle that a sovereign can waive its immunity was applied to both cases within and cases outside the literal terms of the Eleventh Amendment.

Although the late nineteenth century was generally a time of expansion of the Eleventh Amendment, the Amendment was not applied consistently to suits against governmental entities that derived their

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210. 26 U.S. (1 Pet.) 110 (1828).

authority from a state, but were not themselves a state. While an arm of a state had immunity from suit in federal court, municipal corporations did not, even if they partook under state law of the state's immunity. Since the Supreme Court's decision in Lincoln County v. Luning, cities and counties have been unable to find shelter behind the Eleventh Amendment.

Several of these nineteenth century interpretations were refined or completed in the twentieth century. In Ex parte New York (No. 1), [211] the Supreme Court held that, absent consent to suit, a state is immune to suit in admiralty, notwithstanding that the Eleventh Amendment literally applies only to "any suit in law or equity." This case overturned a longtime understanding by courts and the bar to the contrary. [212] Likewise, in Principality of Monaco v. Mississippi, [213] the Court extended protection to states against suits brought by foreign governments, making clear that the immunity flowed not from the Eleventh Amendment, but from concepts of state sovereign immunity generally incorporated under the constitutional plan as a whole.

In the twentieth century, interpretation of the Eleventh Amendment has been far from consistent. In many cases both a finding of a state's immunity or a finding of its amenability to suit could be

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211. 256 U.S. 490 (1921).

212. The court held in error a decision of Supreme Court Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (No. 14, 647) (C.C.D. Pa. 1809), that the states were subject to suit in federal court in admiralty cases. Though the decision did not receive a holding of the Supreme Court at the time, it was cited in dicta in other cases and was deemed by commentators to represent the law. See Governor of Georgia v. Madrazo, 1 Pet. (32 U.S.) 110, 124 (1828); 3 J. Story, Commentaries of the Constitution of the United States 560-561 (Boston: 1833); A. Conkling, A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States 4 (4th ed., 1864).

213. 292 U.S. 313, 322-323 (1934).

adequately sustained by prior legal precedent. Consequently, Eleventh Amendment cases have been increasingly complex in their treatment by the Supreme Court. The Amendment has been expanded in some circumstances and contracted in others. The following discussion attempts to describe the major developments in the law that are found in the Eleventh Amendment decisions issued by the Supreme Court in this century.

1. Eleventh Amendment cases.

a. Consent to suit.

In the mid-twentieth century, the Supreme Court for a brief period refined and expanded one of the two traditional common law means of avoiding a finding of sovereign immunity: consent to suit. 214/ The theory that states may consent to suit in federal courts, or waive their immunity from suit, had first appeared in American constitutional law during the late nineteenth century expansion of the Eleventh Amendment. Its emergence demonstrated that the Supreme Court viewed the Eleventh Amendment not so much as a jurisdictional bar, since generally a jurisdictional bar may not be waived, but as a means for avoiding enforcement of state or federal law against the states when the tools of enforcement are not within access to the Supreme Court. 215/

Initially consent to suit cases involved express consent, whereby a state by its constitution or law permitted itself to be sued, or empowered its law officer to put in an appearance on its behalf in a lawsuit. 216/ But the Court did not lightly find that a state consented to

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214. The other is suit against an officer of the state.

215. This conclusion is reached by several commentators, notably Dean John Orth. Orth, supra note 83, at 154-55.

216. See Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906).

suit. It strictly construed statutes alleged to demonstrate consent, so that a general authorization "to sue and be sued" was ordinarily insufficient to constitute consent. [217] Furthermore, the Court held that a state may waive its immunity in its own courts without consenting to suit in federal courts. [218]

As a general legal principle, whatever can be done expressly can also be done by implication. Under this principle, in several instances the Supreme Court has found that a state waived its Eleventh Amendment immunity by implication. However, the continued vitality of these cases is questionable.

In 1959, in *Petty v. Tennessee-Missouri Bridge Commission*, [219] the Supreme Court first found implied waiver of a state's Eleventh Amendment immunity. The case concerned a congressionally approved compact between two states for building a bridge. Because the compact conferred power on the interstate commission in control of the project to "sue and be sued" and provided that nothing in the compact would impair any jurisdiction of the United States, the Court found that the states party to the compact had impliedly consented to suit in federal courts. This would seem to be consent implied in fact.

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217. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Kennecott Copper Corp. v. State Tax Comm.*, 327 U.S. 573 (1947); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); *Florida Dept. of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). Compare *Patsy v. Florida Board of Regents*, 457 U.S. 496, 519, n* (1982) (Justice White concurring), with *id.*, 522 and n. 5 (Justice Powell dissenting).

218. *Smith v. Reeves*, 178 U.S. 436 (1900); *Murray v. Wilson Distilling Co.*, 231 U.S. 151, 172 (1909); *Graves v. Texas Co.*, 298 U.S. 393, 403-404 (1936); *Great Northern Life Insurance Co v. Read*, 322 U.S. 47 (1944).

219. 359 U.S. 275 (1959).

In 1964, the Court found implied consent where there was even less of a link to any action on the part of the state that would represent its acquiescence to suit. In Parden v. Terminal Railway of Alabama, [220] employees of a state-owned railroad sued the state of Alabama in federal court under the Federal Employees' Liability Act (FELA), which specifically created a cause of action in federal court against "every common carrier by railroad" for damages suffered by employees from job-related personal injuries.

The Court engaged in a three-step analysis. First, the Court discussed whether Congress intended to subject states to suit under the FELA. The Court reasoned that the express language of the statute created a cause of action against "every common carrier," and absent express language to the contrary, a statutory exception for sovereign immunity should not be presumed. Thus, the Court reasoned that Congress intended to subject states to suit in federal court under the FELA.

Second, the Court considered whether Congress had the power to subject a state to suit in federal courts notwithstanding the Eleventh Amendment. The Court determined that in giving Congress the power to regulate interstate commerce, the states had surrendered any sovereign immunity that would impede that regulation. Therefore, in acting under its commerce power, Congress could override states' sovereign immunity.

Finally, the Court queried whether Alabama's operation of a railroad in interstate commerce after its abrogation of sovereign immunity (in giving Congress the right to regulate interstate commerce) implied that the state had consented to suit in federal court under the FELA. The Court answered in the affirmative and concluded that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 221/ Thus, the Court held that Congress could condition entry into a federally-regulated activity upon a state's willingness to be sued in federal court.

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[220] 377 U.S. 184 (1964).

In 1973, the Court began constricting the implied waiver doctrine. In Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 222/ the Court denied federal court jurisdiction to state health facility employees in their suit against the state of Missouri for overtime pay and damages under the Fair Labor Standards Act of 1938 (FLSA). Although the Court found that the FLSA, as amended in 1966, defines states and their agencies as potential defendants, because the Act reaches "any employer," the Court found no clear congressional intent to subject states to suit in federal court. 223/ The Court distinguished Parden on the basis that, because the FLSA authorized the United States to sue on behalf of employees (which the FELA did not) the Court saw no reason to imply consent to suit by employees on their own behalf.

In Edelman v. Jordan, 224/ a closely divided Supreme Court further limited the doctrine of implied waiver of Eleventh Amendment immunity. Edelman was a class action suit brought for injunctive and declaratory relief against state officials and alleging violations of federal law regarding their administration of the federal-state programs of

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221. Id. at 196.

222. 411 U.S. 279 (1973).

223. Id. at 285.

224. 415 U.S. 651 (1974).

Aid to the Aged, Blind, and Disabled (AABD). Federal funding for AABD was available under the Social Security Act. Although that statute does not create a private cause of action, the plaintiffs brought the suit under section 1983 of the Civil Rights Act of 1964. The U.S. Court of Appeals for the Seventh Circuit held in the alternative that even if the Eleventh Amendment barred retroactive relief against the state, the state had waived its Eleventh Amendment immunity and consented to suit in federal court by participating in the federal AABD program.

The Supreme Court reversed, distinguishing the case from Parden and Employees on the basis that those cases "involved a congressional enactment by which its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities," 225/ and section 1983 does not. The Court practically eliminated the functionality of the implied waiver doctrine, holding that a court may find waiver by a state "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" 226/

b. Congressional abrogation of Eleventh Amendment immunity pursuant to the Reconstruction amendments.

The Constitution grants Congress the power to enact laws that govern or affect states in certain areas. At least in some contexts when Congress does so, it may subject states to suit brought by individuals to enforce the legislation. The Reconstruction amendments are the clearest

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225. Id. at 672.

226. Id. at 673 (quoting Murray v. Wilson Distilling Co., 231 U.S. 151, 171 (1909)).

example of this balance of power. Those amendments directly restrict state powers and expressly provide for congressional implementing legislation to regulate states.

Although sovereign immunity and the Eleventh Amendment have generally fared well in the twentieth century, they have not proved to be invincible tools for the states. After abandoning its role as champion of the rights of property during the 1930's, the Supreme Court donned the role of defender of civil rights. The Supreme Court's bold stance in the historic Brown v. Board of Education [227] case in 1954 marked the end of the judiciary's long adherence to the Compromise of 1877, which left states free to violate the civil rights won in the Civil War. Encouraged by the Court, Congress for the first time in almost a century passed civil rights legislation to hold the South accountable on the issue of race.

With this political backdrop, to support congressional power in this field, the Court discovered an exception to the Eleventh Amendment: the principle that "the Eleventh Amendment and the principle of state sovereignty which it embodies ... are necessarily limited, by the enforcement provisions of section five of the Fourteenth Amendment." [228]

As early as 1964, in the Parden decision, authored by Justice Brennan, the Supreme Court as an alternative holding seemed to state that Congress' power to regulate interstate commerce included the authority to subject states to suit notwithstanding the Eleventh Amendment. [229]

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[227] 347 U.S. 483 (1954).

[228] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[229] 377 U.S. at 190-192, 196-198; see also Employees, 411 U.S. at 283, 284, 285-286 (stating that Congress has the power to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court," and that "when Congress does act, it may place new or even enormous fiscal burdens on the States").

However, in Edelman, the Court seemed to indicate that a two-part test had to be met before states lose their immunity: "whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." [230]

In Fitzpatrick v. Bitzer, [231] the Court explicitly held for the first time that state waiver is not always required to abrogate [232] Eleventh Amendment immunity. The case was brought by state employees who sued Connecticut in federal court claiming sexual discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), which authorizes the award of damages and attorney's fees to private parties and specifies governments and their agencies as possible defendants.

The Court specified as a threshold requirement for a finding of abrogation the clear evidence of congressional authorization to sue a class of defendants which clearly includes states. [233] Without examining whether Connecticut had waived its Eleventh Amendment immunity, the Court found that in enacting Title VII, Congress clearly intended to authorize federal courts to award damages in private suits against the states. [234] The Court held, in effect, that with respect to legislation passed pursuant to Congress' authority under section five of the Fourteenth Amendment,

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230. 415 U.S. at 672.

231. 427 U.S. 445 (1976).

232. In traditional Eleventh Amendment parlance, abrogation refers to the ability of Congress to create a cause of action for money damages enforceable by a citizen suit against a state in federal court. See, e.g. United States v. Union Gas Co., 832 F.2d 1343, 1345, n. 1 (3d Cir. 1987), cert. granted, ___ U.S. ___, 107 S.Ct. 865 (1988).

233. 427 U.S. at 452 (citing Edelman, 415 U.S. at 672).

234. Id. at 448-449, 452.

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Congress could, if it clearly so intended, unilaterally nullify Eleventh Amendment immunity without a states' consent, express or implied. [235] The Court emphasized the fact that the Fourteenth Amendment was ratified after the Eleventh became part of the Constitution, and implied that earlier grants of legislative power to Congress in the main body of the Constitution might not contain a similar power to authorize suits against the states. [236]

The Fitzpatrick holding was reaffirmed and expanded in Hutto v. Finney, [237] a case concerning an award of attorney's fees against a state prison system that inflicted constitutionally impermissible cruel and unusual punishment. The basis for the lower court's award was the Civil Rights Attorney's Fees Awards Act of 1976, a statute passed pursuant to Congress' Fourteenth Amendment power. In Hutto, the Supreme Court decided that an individual could recover an award under the statute in a civil rights case against a state even though the statute at issue did not expressly include states in the defendant class, if there is clear evidence of congressional intent to arbogate Eleventh Amendment immunity in the statute's legislative history.

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235. Id. at 456.

236. Id. The Court stated that under the Fourteenth Amendment Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." The Court did not clarify whether "other contexts" refers to exercises of congressional power pursuant to other parts of the Constitution or to suits brought without evidence of congressional authorization. However, the fact that the Court distinguishes Parden seems to indicate the latter.

237. 437 U.S. 678 (1978).

In dissent, Justice Powell, joined by Chief Justice Burger, argued that only express statutory language was sufficient to withdraw state immunity. [238] In a separate dissenting opinion, Justice Rehnquist further opposed the majority opinion on the issue of the source of Congress' power to abrogate the Eleventh Amendment. He argued that while Fitzpatrick concerned a violation of the Fourteenth Amendment, Hutto concerned the infliction of cruel and unusual punishment, which is expressly prohibited by the Eighth but not by the Fourteenth Amendment. He concluded that even though the Court has held that the Fourteenth Amendment "incorporates" the prohibition against cruel and unusual punishment, it does not follow that Congress has the same enforcement power under section five of the Fourteenth Amendment with respect to a constitutional provision which has been judicially incorporated into the Fourteenth Amendment that it has with respect to the literal provisions of the Amendment. Thus, rather than examining the statute upon which the damages award at issue was based to see if Congress intended to abrogate state immunity with respect to the award, Justice Rehnquist would look to Congress' power to abrogate immunity pursuant to the constitutional harm underlying the damages award. Furthermore, he suggested that Congress can only abrogate states' immunity with respect to cases arising under the literal terms of the Fourteenth Amendment, and not the prohibitions against states that are incorporated in the Amendment.

Four years after the Fitzpatrick decision, the Supreme Court in City of Rome v. United States, [239] suggested that section two of the

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[238] Id. at 704.

[239] 446 U.S. 156 (1980).

Fifteenth Amendment also can serve a basis for congressional power to abrogate Eleventh Amendment immunity. However, the Court decided the case based on general principles of federalism. [240]

In 1985, in a 5-4 decision authored by Justice Powell, the Supreme Court pulled in the reins on the abrogation of immunity argument. In Atascadero State Hospital v. Scanlon, [241] a disabled person sued a state hospital in federal court for alleged employment discrimination. The suit was brought under the Rehabilitation Act of 1973, a statute which the Court assumed had been passed pursuant to section five of the Fourteenth Amendment. The statute provided for remedies against "any recipient of Federal assistance," a class that arguably includes states.

The Court recognized Congress' power to abrogate a state's immunity in circumstances in which "the usual constitutional balance between the States and the Federal Government does not obtain." [242] It specifically noted circumstances in which Congress passes legislation to enforce the provisions of the Fourteenth Amendment as being appropriate for such abrogation, without raising the issue of Congress' Article I powers. The Court went on to hold that in the instant case, the Eleventh Amendment barred recovery from the state because a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." [243] Thus, the Court adopted as law the clear language rule espoused in Justice Powell's dissenting opinion in *Hutto* as law.

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[240] The Court stated, "Fitzpatrick stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" Id. at 179.

[241] 473 U.S. 234 (1985).

[242] Id. at 242.

[243] Id. at 246.

Atascadero is significant because it retreats from the Court's position in *Hutto*, without specifically overruling that decision. The case requires that a particular statute *specifically* include states in the defendant class for a finding of congressional abrogation of states' immunity. Furthermore, the Court held that a state's mere participation in a federally-funded program under a federal statute does not demonstrate implicit consent to federal jurisdiction. For purposes of implied waiver, the Court would require an "unequivocal indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment." [244]

Arguing for the dissent, [245] Justice Brennan expanded upon his theory of the Eleventh Amendment presented in his dissenting opinion in the *Employees* case, arguing that the majority's Eleventh Amendment analysis "diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests." [246] First, Justice Brennan argued that the statutory language at issue contained no special exemption for states, rendering the language sufficiently clear for a finding of congressional abrogation, and that the legislative history confirms such a conclusion. [247] He maintained that the majority put in place a series of special rules of statutory draftsmanship for congressional abrogation of the Eleventh Amendment designed for the purpose of keeping the disfavored suits out of federal court, and he argued that such rules are not justified as a means of determining the genuine intent of Congress. [248]

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[244] *Id*. at 238, n. 1.

[245] Justices Brennan, Marshall, Blackmun, and Stevens.

[246] *Id*. at 247-48.

[247] *Id*. at 248-52.

Second, Justice Brennan complained that the majority's rationale for the establishment of these rules -- that the Eleventh Amendment was adopted to clarify that "'the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III' of the Constitution," [249] -- is historically inaccurate. [250] Justice Brennan, to the contrary, reiterated his position that when the Constitution was ratified there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against states, [251] that the Constitution requires states to answer in federal courts for violations of duties lawfully imposed on them by Congress in the exercise of its Article I powers, [252] and that the Eleventh Amendment was intended simply to narrow Article III's state-citizen and state-alien diversity clauses to prevent suit in federal courts against a state where the only basis of jurisdiction is diversity of citizenship. [253]

In 1987, in *Welch v. State Dep't of Highways and Public Transp.*, [254] the Supreme Court reaffirmed its *Atascadero* holding in a case filed under the Jones Act. That statute applies the remedial provisions of the FELA to seamen injured in the course of employment. Noting that the issue of a state's waiver of Eleventh Amendment immunity was not raised in the petition for certiorari, the Court addressed the question of whether Congress abrogated states' immunity from suit under the Jones Act.

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[248] *Id.* at 254.

[249] *Id.* at 252 (*quoting Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984).

[250] *Id.* at 259.

[251] *Id.* at 278.

[252] *Id.* at 280.

[253] *Id.* at 287.

[254] ___ U.S. ___, 107 S. Ct. 2941 (1987).

The plurality assumed, "without deciding or intimating a view of the question," that Congress' authority to subject unconsenting states to suit in federal court is not confined to its powers under section five of the Fourteenth Amendment. [255] The plurality then concluded that Congress did not abrogate states' immunity from suit in passing the Jones Act because Congress did not express in unmistakable statutory language its intention to allow states to be sued in federal court under the Jones Act. The plurality explained that despite language in the Jones Act extending its provisions to "any seamen...," the Eleventh Amendment "marks a constitutional distinction between the states and other employers of seamen." [256] The plurality refused to consider an additional argument concerning congressional intent regarding a remedy for seamen employed by the states because "Eleventh Amendment immunity partakes of the nature of a jurisdictional bar," and the Court thus could not consider the argument. [257]

Finally, the plurality reviewed the similarities in the factual circumstances of the Parden case with the case at bar. The Court held that although Parden primarily rested upon the theory that the state impliedly waived its constitutional immunity, and not Congress' abrogation of

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255. Id., 107 S. Ct. at 2946.

256. Id. at 2947.

257. Id. at 2947, n. 6.

immunity, to the extent the holding of that case was inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it was overruled. [258]

In a separate concurring opinion, Justice Scalia joined the court in overruling Parden, but found it unnecessary to the case at bar to determine the validity of Hans v. Louisiana and the issue whether Article III of the Constitution contains an implicit limitation on suits brought by individuals against states. [259] He contended that because Hans "has been assumed to be the law for nearly a century," the Court must assume that an understanding that the federal judicial power could not extend to suits brought by individuals against states clearly underlay the Jones Act and the FELA. Therefore, he concluded that although the terms of the Jones Act, through its incorporation of the FELA, apply to all common carriers by water, they do not apply to states. [260]

In another dissent by Justice Brennan, four Justices again opposed the majority's interpretation of the Eleventh Amendment. Justice Brennan argued that: the Eleventh Amendment does not bar any suits in admiralty; Hans v. Louisiana represents an unsound interpretation of the Constitution which was, in any event, wrongly interpreted by the majority, because the Amendment does not bar suits by a citizen against his own state; and, the Amendment only applies to diversity suits against states and not federal question suits. Justice Brennan concluded that even if the

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[258] Id. at 2948.

[259] Id. at

[260] Id.

Eleventh Amendment were applicable in the case at bar by passing the Jones Act and the FELA pursuant to its Article I commerce clause powers, Congress abrogated that immunity. [261]

c. Congressional abrogation of Eleventh Amendment immunity pursuant to Article I.

Thus far, the Supreme Court has avoided deciding directly the issue of whether Congress has the authority, pursuant to its Article I powers, to abrogate the states' Eleventh Amendment immunity. The Welch decision demonstrates that the Court will not reach the issue of Congress' Article I authority unless the statute before the Court meets the threshold "clear language" requirements established in Atascadero. This poses a problem with respect to the many statutes, including the Copyright Act of 1976, passed by Congress pursuant to Article I prior to that decision. The issue of whether those statutes create a private cause of action that can be invoked against a state can only be tested if Congress amends the language of the statutes to clarify its intent that states are included in the defendant class.

Despite the Supreme Court's reluctance to do so, several lower federal courts have interpreted the Eleventh Amendment to permit congressional abrogation of immunity pursuant to its Article I powers. Between 1976 and 1985, lower federal courts expanded the Fitzpatrick holding in several non-Fourteenth Amendment contexts to find in the relevant statutes clear congressional intent to abrogate Eleventh Amendment immunity. In County of Monroe v. Florida, [262] the U.S. Court of Appeals for the Second Circuit found that Congress abrogated state's Eleventh Amendment immunity under its Article I extradition powers. In Peel v. Florida Department of Transportation, [263] the U.S. Court of Appeals for the Fifth Circuit held that Congress abrogated state's Eleventh Amendment immunity when it enacted the Veterans' Reemployment Rights Act pursuant to its Article I war powers. In Jennings v. Illinois Office of Education, [264] the Seventh Circuit reached the same conclusion. And, in Mills Music, Inc. v. Arizona, [265] a case that will be discussed in greater detail in an analysis of relevant copyright cases, the U.S. Court of Appeals for the Ninth Circuit held that Congress abrogated state's immunity when it passed the Copyright Act of 1909 pursuant to its Article I copyright and patent clause power.

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[261] Id. at 2958.

[262] 678 F.2d 1124, 1128-35 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

These cases seem to illustrate that during the period between the issuance of Fitzpatrick and the later Atascadero decision, lower courts interpreted Fitzpatrick as the "*sub silentio* merging of the separate state consent requirement into the single inquiry of whether Congress has statutorily waived the state's immunity." [266] Furthermore, they represent the lower courts' interpretation that Congress may abrogate the Eleventh Amendment pursuant to its Article I powers. The continued validity of those early decisions was called into question after the Supreme Court issued its decision in Atascadero. However, several lower courts have found congressional abrogation evidenced in an Article I statute even under the "clear language" standard.

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[263] 600 F.2d 1070 (5th Cir. 1979).

[264] 589 F.2d 935 (7th Cir. 1979), *cert. denied*, 441 U.S. 967 (1979).

[265] 591 F.2d 1278 (9th Cir. 1979).

[266] Peel, 600 F.2d at 1080.

In *Matter of McVey Trucking, Inc. v. Illinois*, [267] the Seventh Circuit held that Congress, in enacting the Bankruptcy Code pursuant to its Article I powers to establish bankruptcy law, made clear in the language of the statute its intent that the federal court cause of action against creditors includes creditors that are states. The court further engaged in a lengthy historic analysis of Congress' power under Article I and the Fourteenth Amendment and found that Congress has the same authority under Article I that it has under the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity.

The Seventh Circuit began its argument from the premise that if there is no constitutionally significant way of distinguishing between the Congress' plenary power under the Fourteenth Amendment and its plenary power under Article I, then Congress' ability to create a cause of action for money damages enforceable against an unconsenting state in federal court is not limited to actions that it takes using its Fourteenth Amendment power. The court first considered differentiating Congress' Fourteenth Amendment power on the theory that the Amendment constituted a limited repeal of restrictions that the Eleventh Amendment placed on congressional power or federal court jurisdiction. However, it eliminated that theory by finding that historical evidence indicates that the Eleventh Amendment was intended to bar a judicial construction that the federal courts' jurisdiction extends to suits in which states are sued under state law, or also perhaps under diversity jurisdiction, [268] and that it was not intended to be a general limitation on the judicial powers of the federal courts to adjudicate cases arising under federal law. The court reasoned that, since the Amendment did not limit any aspect of Congress' Article I powers or the Article III federal question jurisdiction, there was no restriction inherent in the Eleventh Amendment for the Fourteenth Amendment to repeal. [269]

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[267] 812 F.2d 311 (7th Cir. 1987), *cert. denied sub nom. Edgar v. McVey Trucking Company*, 108 S. Ct. 227 (1987).

[268] The Court characterized the result of this finding: "[t]he Amendment simply makes clear that Article III does not itself abrogate the presumptive immunity from suit that states enjoy. *Id.* at 317.

The court also considered differentiating Congress' Fourteenth Amendment power on the theory that the Congress' constitutional grant of power to displace state authority (derived from state sovereignty and not just the Eleventh Amendment) is greater under the Fourteenth Amendment than under Article I. The court concluded that Congress has the power to impose financial burdens on a state (whether by creating a cause of action enforceable against it or otherwise) so long as the Constitution has "divested [the states] of their original powers and transferred those powers to the Federal Government," [270] and that the extent of Congress' power to impose its will on the states is no greater under one plenary power than under another. Furthermore, it concluded that because state sovereignty imposes no limitation on federal courts under Article III, there is no restriction on federal courts for the Fourteenth Amendment to remove. Thus, the court held that because Congress may create a cause of action for money damages enforceable against an unconsenting state in federal court under its Fourteenth Amendment power, it may do so under any of its plenary powers.

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[269] *Id.* at 317-319.

[270] *Id.* at 320.

Most recently, in United States v. Union Gas Company, [271] the Third Circuit reached the same conclusion that was reached by the Seventh Circuit in McVey with respect to Congress' power to abrogate pursuant to its Article I powers. The case involved a third party plaintiff suing the state of Pennsylvania in federal court for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund"), a statute passed pursuant to Congress' Article I power to regulate interstate commerce. The court held that the statute posed no problem with respect to the Atascadero "clear language" requirement, because Congress amended it in the Superfund Amendments and Reauthorization Act of 1986 ("SARA") to provide "the requisite unmistakably clear language needed to abrogate the states' [E]leventh [A]mendment immunity." [272]

The Third Circuit agreed with the reasoning of the McVey decision as to the lack of constitutional distinctions between the Fourteenth Amendment and Article I for purposes of Eleventh Amendment abrogation. Without addressing the historical argument that the Eleventh Amendment was never intended to reach federal question jurisdiction, the Court focused on its belief that the Amendment was never intended to limit Congress' Article III powers but, rather, was intended to limit federal courts' power to construe the grant of judicial power in Article III to "abrogate the states' [sic] presumptive immunity from diversity suits." [273] The Third Circuit maintained that the constitutional design indicates that our federalist system with its checks and balances contemplates that "'restraints upon Congress of its plenary [Article I powers] lie in the legislative process and not in the judicial process.'" It stated that the requirement that Congress must clearly state its intention to abrogate states' Eleventh Amendment immunity assures that congressional intent will be followed and judicial interpretation of statutes will be checked. 274/

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[271] 832 F.2d 1343 (3d Cir. 1987), cert. granted, ___ U.S. ___, 107 S.Ct. 865 (1988).

[272] Id., 832 F.2d at 1347-1348.

[273] Id. at 1353.

The Third Circuit noted that at the time the *Union Gas II* decision was issued, every federal appellate court to have addressed the question had found that Congress may subject the states to suit in federal court, the Eleventh Amendment notwithstanding, when acting pursuant to its plenary powers.

The Supreme Court has granted certiorari to review the Third Circuit's decision in *Union Gas II*. 275/

d. Suits against state officers.

Since *Ex Parte Young* was decided in 1908, the standard legal device by which to test the validity of state legislation in federal courts prior to enforcement of the statute and interpretation in state courts has been suits against state officers alleging that they are acting pursuant to an unconstitutional statute. 276/ Likewise, suits to enjoin state

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274. *Id.* at 1355 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 857 (1976) (Brennan, J., dissenting).

275. *Pennsylvania v. Union Gas*, ___ U.S. ___, 108 S.Ct. 1219 (Mar. 21, 1988).

276. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); *Graham v. Richardson*, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); *Hawks v. Hamill*, 288 U.S. 52 (1933); *Mass. State Grange v. Benton*, 272 U.S. 525 (1926); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925); *Terrance v. Thompson*, 263 U.S. 197 (1923); *Cavanaugh v. Looney*, 248 U.S. 453 (1919); *Traux v. Raich*, 239 U.S. 33 (1915); *Home Tel. & Tel. Co. v.*

officials from taking actions in contravention of federal statutes or to order their undertaking other actions required by the Constitution or federal laws are commonly brought to hold states accountable to federal standards. [277]

However, the Supreme Court continues to hold to the view first expressed as early as 1828 in Governor of Georgia v. Madrazo that some suits against officers are "really" against states, and are barred by the state's Eleventh Amendment immunity. The most common instances of such suits are those involving state property or asking for relief which clearly calls for the exercise of official authority, such as paying money out of the treasury to remedy past harms. [278] Under this theory, suits against state officials to recover taxes have been increasingly difficult to maintain. [279]

In Edelman v. Jordan [280] the Supreme Court seemed to issue a new restrictive interpretation of what the Eleventh Amendment proscribes with respect to suits against state officials. In that case, the Court held that it was permissible for federal courts to require state officials to

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Co. v. City of Los Angeles, 227 U.S. 278 (1913). See also Schuck, Suing Government: Citizen Remedies for Official Wrongs (1983).

[277] See Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651, 664-668 (1974); Quern v. Jordan, 440 U.S. 332, 346-349 (1979); Goldberg v. Kelly, 397 U.S. 254 (1970).

[278] See Ford Motor Co. v. Dep't of the Treasury, 323 U.S. 459, 464 (1945); see, e.g., Worcester County Co. v. Riley, 302 U.S. 292 (1937) (suit brought under the Federal Interpleader Act to restrain state tax officials from collecting death taxes where two states claim being last domicile of decedent held to be a suit against state).

[279] Beginning with Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944), the Supreme Court has held that a suit against a revenue officer to recover taxes illegally collected cannot be maintained in federal court unless the state expressly consents to suit.

[280] 415 U.S. 651 (1974).

comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking or issue orders directing payment of funds found to be wrongfully withheld. [281] Thus, even though the effects on the state treasury might be the same with respect to prospective and retroactive relief, the Court found that retroactive payments as a form of compensation to those wrongfully denied funds in the past were tantamount to the imposition of liabilities which must be paid from public funds in the treasury and were forbidden by the Eleventh Amendment. On the other hand, the funds withdrawn from the state treasury by state officials to effectuate a prospective-only injunction would be "an ancillary effect" which is "a permissible and often an inevitable consequence" of *Ex Parte Young*. [282]

The Court reaffirmed its *Edelman* holding in *Quern v. Jordan*, [283] but held that state officials could be ordered to notify members of the class that had been denied retroactive relief that they might seek retroactive benefits by invoking state administrative procedures. Without directing the state to pay such amounts, the order left retroactive relief to state discretion.

The later case *Milliken v. Bradley* [284] illustrated that *Edelman* may pose more of a formal restriction than an actual one. In that case, state officers were ordered to finance remedial educational programs to counteract the effects of past school segregation. Although the Court

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281. *Id*. at 667-668.

282. *Id*. at 668.

283. 440 U.S. 332 (1979).

284. 433 U.S. 267 (1977).

ordered the state to make payments as a result of its past constitutional violations, the Court did not view them as "compensation" because they were not paid to the victims of past discrimination, but instead used to improve conditions for future generations. [285]

e. Suits against cities and counties.

The special status of cities and counties in Eleventh Amendment law has continued up to the present. Generally, states are protected by the Eleventh Amendment but municipal corporations are not. However, as intermediate governmental bodies have increased in number and importance in the operation of state government, definitional problems have arisen.

With respect to governmental entities that derive their authority from a state, but are not the state, two tests of whether they can partake in the state's Eleventh Amendment immunity have been articulated by the Supreme Court: whether a monetary judgment against the entity in question would be satisfied out of the state treasury, [286] and whether the entity is an "arm of the state." [287] These tests have led to some seemingly anomalous results. A state department of banking has been held to be protected by the Eleventh Amendment, [288] but a state board of education has not. [289] A bridge and tunnel district has been held immune from suit [290] but a bridge and tunnel authority and several turnpike commissions have not. [291] A state university construction fund has been held to be immune, [292] but a state university board of trustees of an internal improvement fund has not. [293]

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[285] Id. at 290, n. 22.

[286] Ford Motor Co. v. Dep't of the Treasury, 323 U.S. 459, 463-464 (1945).

[287] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

[288] Federal Deposit Ins. Corp. v. Cades, 357 F.Supp. 1111 (E.D. Pa. 1973).

[289] Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971), cert. denied, 409 U.S. 892 (1972).

The Supreme Court has also ruled that entities created through interstate compacts (subject to congressional approval) generally are subject to suit. [294]

2. *Prevailing interpretations of the Eleventh Amendment*.

Given the complexity and inconsistency of the case law interpreting the Eleventh Amendment, it is not surprising that there is still no agreement among legal scholars as to what the Amendment means or what it prohibits. Current legal literature on the topic indicates that there are three main theories explaining the Eleventh Amendment which most contemporary commentators adopt or utilize, in part or in whole, to analyze the Amendment: the theory that the Amendment is a federal court jurisdictional

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290. *Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) (immunity waived in this case).

291. *Raymond Int'l Inc. v. The M/T Dalzelleagle*, 336 F.Sup. 679 (S.D.N.Y. 1971); *Doris Trading Corp. v. SS Union Enter.*, 406 F.Supp. 1093 (S.D.N.Y. 1976); *Litton RCS, Inc. v. Pennsylvania Turnpike Comm'n*, 376 F.Supp. 579 (E.D. Pa. 1976), *aff'd mem. sub nom.*, *Litton Business Sys., Inc. v. Pennsylvania Turnpike Comm'n*, 511 F.2d 1394 (3d Cir. 1975); *S. J. Groves & Sons Co. v. New Jersey Turnpike Auth.*, 268 F.Supp. 568 (D.N.J. 1967).

292. *George R. Whitten, Jr., Inc. v. State Univ. Constr. Fund.*, 493 F.2d 177 (1st Cir. 1974); *see also* *Mifsud v. Palisades Geophysical Inst. Inc.*, 484 F.Supp. 159 (S.D. Tex. 1980); *Huckins v. Board of Regents*, 263 F.Supp. 622 (E.D. Mich. 1967).

293. *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972).

294. *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

bar in both diversity and federal question subject matter jurisdiction cases; the theory that the amendment is only a reinstatement of common law immunity; and the theory that it is only a limit in diversity jurisdiction cases brought against state governments.

The first theory, advanced by the Supreme Court majority in recent years, asserts that the Eleventh Amendment creates a constitutional restriction on subject matter jurisdiction that precludes federal courts from hearing any suits against state governments, with the possible exception of suits brought under certain constitutional amendments passed after the Eleventh Amendment. [295] This theory rests on the assumption that the *Hans v. Louisiana* decision stands for the proposition that the Eleventh Amendment is a constitutional bar to suits against a state by its own citizens as well as by citizens of other states. To reach this conclusion, the theory further assumes that *Chisholm v. Georgia* was incorrectly decided and the Eleventh Amendment did not alter the Constitution, but merely overruled *Chisholm* and reinstated the original understanding of its framers that Article III incorporated into the Constitution principles of common law sovereign immunity. The historical accuracy of this analysis is contested by a number of legal scholars today, as well as a number of Supreme Court Justices.

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[295] *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) ("[T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III..."), *quoted in Welch v. State Dep't of Highways and Public Transp.*, ___ U.S. at ___, 107 S. Ct. at 2945, and *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238; *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982) (characterizing the issue before the Court as a "determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court"); *Cory v. White*, 457 U.S. 85, 91 (1982) (holding that "the Eleventh Amendment bars the statutory interpleader sought"); *Edelman v. Jordan*, 415 U.S. at 663 (referring to the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); *Missouri v. Fiske*, 290 U.S. 18, 25 (1933) ("The Eleventh Amendment is an explicit limitation of the judicial power of the United States").

The analytical difficulty that has plagued advocates of the theory that the Eleventh Amendment poses a jurisdictional bar on federal courts lies in reconciling it with the theory of consent and waiver. If the Eleventh Amendment were a true jurisdictional bar, a state's consent to suit or waiver of its Eleventh Amendment rights could not vest the court with judicial power. A fundamental principle of federal court jurisdiction is that subject matter jurisdiction may not be achieved in federal court through consent or waiver. [296]

But it is also settled under current law that the bar on suits against states in federal court posed by the Eleventh Amendment is not wholly jurisdictional. [297] To the extent that it is not, this theory holds that federal courts may subject states to suit if Congress, pursuant to its granted powers, explicitly legislates against state immunity. [298]

Two distinguished scholars agree with the current majority of the Supreme Court that sovereign immunity is a constitutional requirement affecting jurisdiction, but they argue that the amendment only prohibits incursions by the federal judiciary and leaves Congress free to adjust the

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296. See, e.g., Sonsa v. Iowa, 419 U.S. 393, 398 (1975); Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Mansfield , C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884). This rule arises from the fact that federal courts are courts of limited jurisdiction, a principle established, in part, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

297. See Patsy v. Florida Board of Regents, 457 U.S. 496, 515-16, n. 19 (1982).

298. See Hutto v. Finney, 437 U.S. 673 (1978); Quern v. Jordan, 440 U.S. 332, 343-45 (1979).

immunity to modern needs, regardless of whether the adjustment is made pursuant to Congress' power under section 5 of the Fourteenth Amendment. [299] This theory assumes that Chisholm was wrongly decided and that the Eleventh Amendment merely clarified that Article III does not have the self-executing effect of abrogating states' sovereign immunity in federal tribunals. The theory does not, however, conclude that the Eleventh Amendment is in any way a jurisdictional bar; rather, it concludes that the Amendment carved no new limits for the permissible reach of otherwise valid federal legislation. The scholars advocating this theory argue that the language and history of the Eleventh Amendment illustrate that it is directed at the federal courts and not Congress, and that because Congress is uniquely sensitive to both federal and state needs, the judiciary should defer to federal laws affecting the states.

The second main theory of the Eleventh Amendment views it as a reinstatement of the common law immunity from suit which the states had, implicit in the Constitution, prior to the Chisholm decision. Under this theory, most clearly stated by Justice Marshall in a concurring opinion in Employees of the Department of Public Health Welfare v. Department of Public Health & Welfare, [300] the Eleventh Amendment clarified that the provision in Article III concerning controversies between a state and citizens of another state does not provide a mechanism for making states unwilling defendants in federal court, and common law sovereign immunity survived to provide the same protection for states in any controversy with their own citizens. [301] Under this theory, because at common law the sovereign could waive its immunity, a state can waive its immunity and consent to be sued by its citizens; and such consent may be express or implied as was the case in Parden. Furthermore, because common law rules can be overridden by statute, a valid congressional statute can authorize suits against state governments by their own citizens, (but not citizens of other states or countries), or authorize suits against state governments in their own courts.

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[299] Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 693-99 (1976); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413, 1441-45 (1975).

[300] 411 U.S. at 288.

The analytical gap in this theory arises from the fact that traditionally sovereign immunity arose in a unitary state, prohibiting unconsented suit against a sovereign in its own courts or the courts of another sovereign. But the American states upon entering the Union gave up a certain undefined degree of sovereignty to the national government, a superceding sovereign that does not have plenary power over them but which is more than their coequal. [302] It would seem that in those areas for which the states gave up their sovereignty to allow the Congress to legislate for the welfare of the nation as a whole, the states likewise gave up their immunity from suit in federal court.

One legal scholar has extended Justice Marshall's theory to adapt the traditional concept of sovereign immunity to a federalist government. While agreeing that the Eleventh Amendment merely reinstated common law sovereign immunity, she argues that a state's consent or waiver of its Eleventh Amendment and/or common law sovereign immunity is unnecessary to bring a state defendant into federal court if Congress, acting pursuant to its constitutional authority, creates a statutory cause of action against states. [303]/

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[301] Id. at 292.

[302] Fletcher, supra note 91, at 1066-69.

The third view of the Eleventh Amendment, which is promoted by a number of legal scholars today, treats the Amendment as merely restricting the diversity jurisdiction of federal courts. This theory, rather than focusing on the Amendment's shorter phrase directing its provisions to "any suit in law or equity," directs attention to a comparison of the structure of the Eleventh Amendment and the structure of Article III.

Section 2 of Article III identifies nine categories of cases and controversies which might be heard in federal courts; one of these categories, federal question jurisdiction, is defined in a separate clause, while diversity jurisdiction, encompassing two of these categories (suits between a state and citizens of another state, and suits between a state and citizens or subjects of a foreign state) is defined in two other clauses. According to the third view of the Eleventh Amendment, because the language of the Eleventh Amendment parallels the language of those two clauses of Section 2 of Article III dealing with diversity jurisdiction, and because Chisholm only involved those clauses and did not implicate federal question jurisdiction in any way, it makes sense to view the Eleventh Amendment as restricting only diversity jurisdiction. [304]/

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303. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978).

304. See Fletcher, supra note 91; Gibbons, supra note 63; C. Jacobs, The Eleventh Amendment and Sovereign Immunity 162-63 (1972).

Reiterating this theory, first propounded by Chief Justice John Marshall shortly after the adoption of the Eleventh Amendment, [305] Justice Brennan has argued repeatedly that in suits outside the literal scope of the Amendment, state sovereign immunity exists only by virtue of common law. [306] Under this view of the Amendment, in any cases arising under federal law Congress has the power to eliminate states' immunity. Brennan emphasizes the fact that Justice Iredell's dissent in Chisholm rested on the absence of a statutory remedy and not on the Congress' lack of constitutional power. He interprets Hans as an opinion that can be read as a dismissal of the suit "on the ground that no federal cause of action supported the plaintiff's suit and that state-law causes of action would of course be subject to the ancient common-law doctrine of sovereign immunity." [307]

Finally, the exhaustive study of one legal scholar led him to conclude that "the search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire. And ... the object of the search may prove equally illusory." [308] This scholar outlines the historic and political developments surrounding the ratification and subsequent changing interpretations of the Eleventh Amendment to demonstrate the way in which the realities of judicial power, or powerlessness, affected the Court's interpretation of the Amendment without regard to the original understanding of the framers of the Constitution and the American people. [309]

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[305] See supra note 112 and accompanying text.

[306] Employees of the Dep't of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 313-14 (1973) (Brennan, J., dissenting); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 125 (1984) (Brennan, J., dissenting); Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142, 3150 (1985) (Brennan, J., dissenting); Green v. Mansour, ___ U.S. ___, 106 S. Ct. 423, 429 (1985) (Brennan J., dissenting); Welch v. Texas Dep't Highways and Public Transp., ___ U.S. ___, 107 S. Ct. 2941, 2958 (Brennan, J., dissenting).

[307] Atascadero, 105 S. Ct. at 3177 (Brennan, J., dissenting).

[308] Orth, supra note 83, at 28.

C. Application of the Eleventh Amendment in Copyright Infringement Suits Against States.

The first case in this century concerning whether a state agency could be sued in federal court for alleged copyright infringement was decided by the Eighth Circuit in 1962, [310] two years before the Parden court conceived the doctrine of implied waiver of immunity. In Wihtol v. Crow, [311] the court held that although a state school's choir director infringed a composer's copyright in a musical composition, the school was entitled to dismissal because the school was a state agency that was immune from suit for money damages in federal court. The choir director was held individually liable for his infringement.

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[309] See also Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423 (1983).

[310] In 1898, in Howell v. Miller, 91 F. 129 (6th Cir. 1898), the Sixth Circuit stated that, "it cannot be held that the official [state] character of the present defendants constitutes of itself a reason why they may not be enjoined from infringing the rights, if any, which the plaintiff has under the copyright laws of the United States. A state cannot authorize its agents to violate a citizen's right of property, and then invoke the constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents." Id. at 136. The court held that because federal courts had jurisdiction to enforce the copyright law, federal court jurisdiction in a copyright infringement suit against state officers was proper. Id. at 137. The court cited Tindal v. Wesley, 167 U.S. 204, 221 (1897), which, for Eleventh Amendment considerations, distinguished a suit against a state officer involving the ownership of real estate from the bond cases.

[311] 309 F.2d 777 (8th Cir. 1962).

Seventeen years later, during the height of expansion by the lower federal courts of the Fitzpatrick v. Bitzer doctrine of Congress' abrogation of states' Eleventh Amendment immunity, the Ninth Circuit readdressed the issue of Eleventh Amendment immunity in copyright suits. In Mills Music, Inc. v. Arizona, 312/ the Ninth Circuit found the state of Arizona amenable to suit in federal court for the alleged willful infringement of a copyrighted musical composition, which the state allegedly used as the theme song for a state fair promotion.

The Mills court first looked to see if Arizona waived its Eleventh Amendment immunity under the Parden line of cases on the doctrine of implied waiver of states' immunity. The court determined that those cases establish that Eleventh Amendment immunity would be waived in the instant case if, in passing the Copyright Act of 1909, Congress authorized suit against a class of defendants that included states, and Arizona entered into the federally regulated activity of copyright use. The court found that Congress intended to include states in the class of potential defendants defined in the 1909 Act as "any person" who infringes a copyright. 313/

The Mills court also explored whether Congress abrogated states' immunity in passing the Copyright Act of 1909. Citing Fitzpatrick, the court concluded that the copyright and patent clause of the Constitution empowered Congress to subject infringing states to suits in federal court

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312. 591 F.2d 1278 (9th Cir. 1979).

313. Id. at 1286.

despite the Eleventh Amendment. The court reasoned that when "Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach." [314]

Finally, the court noted that the state voluntarily engaged in a federally regulated, commercial activity well after federal legislation regulated the activity, and that the award granted by the lower court was not so large as to interfere with "the state's budgeting process." [315] Thus, the Court held the state of Arizona liable for damages for copyright infringement and attorney's fees.

Five years after Mills Music was decided, the issue of states' immunity from suit in copyright infringement cases reemerged in Mihalek Corp. v. Michigan. [316] This suit for copyright infringement under the Copyright Act of 1976 against the state of Michigan concerned the state's alleged infringement of an advertising campaign promoting tourism and business and agricultural enterprise in the state. The U.S. District Court for the Eastern District of Michigan rejected the Mills Music rationale.

The district court reasoned that under Edelman v. Jordan, the 1909 Act should not be read to abrogate states' Eleventh Amendment immunity, because a right against infringement "is deserving of no more protection than is the right to benefits for the aged, blind, and disabled," for which the Supreme Court denied "retroactive" monetary relief in Edelman. [317] The Mihalek court held that despite the protection granted copyright owners by Congress under the federal copyright scheme, the Eleventh Amendment barred federal jurisdiction for suits for money damages that would be paid out of state funds. The court acknowledged that the copyright owner could sue in federal court for an injunction against future infringement by Michigan under Ex Parte Young. [318]

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[314] Id. at 1285, quoting Goldstein v. California, 412 U.S. 546 (1973).

[315] Id. at 1286.

[316] 595 F.Supp. 903 (E.D. Mich. 1984), aff'd on other grounds, 814 F.2d 290 (6th Cir. 1987).

[317] Id. at 906; see Edelman, 415 U.S. at 669.

On appeal, the Sixth Circuit affirmed the lower court's summary judgment for the state on the ground that the state agency did not infringe the copyright owner's work, without addressing the issue of Eleventh Amendment immunity. [319]

In Johnson v. University of Virginia [320] the U.S. District Court for the Western District of Virginia applied the reasoning of Mills Music, and held that both the 1909 and 1976 Copyright Acts reflect Congress' intent to abrogate states' Eleventh Amendment immunity in copyright infringement suits. [321] The court did not consider whether the state had waived its constitutional immunity.

The Johnson case marks the last copyright/Eleventh Amendment case to address the immunity issue prior to the Supreme Court's Atascadero holding. Since that decision was issued, all courts specifically addressing the issue have decided in favor of state's immunity from suit in copyright infringement cases.

In Woelffer v. Happy States of America, Inc., [322] an agency and official of the state of Illinois brought an action for declaratory judgment to the federal courts seeking a judicial declaration that they did not infringe the defendant's work and that the Eleventh Amendment barred any counterclaim of infringement asserted by the defendant. The defendant filed counterclaims seeking declaratory relief, prospective injunctive relief, and attorney's fees and costs.

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[318] 595 F.Supp. at 906.

[319] 814 F.2d 290, 297 (1987).

[320] 606 F.Supp. 321 (W.D. Va. 1985).

[321] Id. at 324.

[322] 626 F.Supp. 499 (N.D. Ill. 1985).

The court addressed both the issue of the state's waiver of immunity and the issue of congressional abrogation of immunity. It held that, while the state partially waived its immunity by bringing the action in federal court, under a state waiver argument, the court only had jurisdiction over the declaratory portion of the defendant's counterclaim (the portion raised by the state's complaint), and not the portion seeking injunctive relief, attorney's fees, or costs. This was so because, although declaratory and injunctive relief are both considered prospective relief, the court found that in this particular case, injunctive relief was more intrusive than damages. Furthermore, the court noted that the Supreme Court's Atascadero decision requires that a state's waiver of immunity be unequivocally expressed. [323]/

The court next held that under the Atascadero standard, Congress did not express clearly in the language of the Copyright Act of 1976 its intention to abrogate the Eleventh Amendment and that, therefore, the Amendment barred defendant's claims for injunctive relief and attorney's fees and costs against the state agency. It is interesting to note that the court did not raise the possibility that Congress might not have the authority under Article I to abrogate states' immunity. The Court did, however, note that, pursuant to Ex Parte Young, the state official was amenable to suit in federal court for prospective injunctive relief.

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323. Id. at 503.

In Cardinal Industries, Inc. v. Anderson Parrish Assoc., Inc.,[324] in an unpublished opinion, the U.S. District Court for the Middle District of Florida concluded that the Eleventh Amendment was neither waived nor abrogated in the case at bar, involving copyrighted architectural plans for a student housing project utilized by a Florida state university. The court did not discuss relevant copyright cases or the Supreme Court's Atascadero opinion. The Eighth Circuit affirmed the district court's decision without discussion.[325]

In Richard Anderson Photography v. Radford University,[326] a case concerning a state university's use of copyrighted photographs, the U.S. District Court for the Western District of Virginia reversed its position taken in the Johnson case the year before. The court first considered the issue of congressional abrogation of Eleventh Amendment immunity. Citing Atascadero, the court concluded that "Congress does not have the power to abrogate the states' Eleventh Amendment immunity without their consent unless it acts pursuant to section 5 of the Fourteenth Amendment."[327] Since Congress passes copyright legislation pursuant to its Article I powers and not the Fourteenth Amendment, the court decided that Virginia was immune from suit unless the state had waived its immunity.

Finding no evidence of express waiver of Eleventh Amendment immunity, the Radford University court examined whether the state of Virginia, by operating a university, impliedly consented to suit in federal court for copyright infringement. The court determined that although the 1976 Copyright Act authorizes suits against "anyone" who infringes, a class of defendants which literally includes states, the circumstances did not indicate clearly that Virginia consented to suit in federal court. The court reasoned that, therefore, the statute lacks the "unequivocal indication" of consent required for a finding of waiver under Atascadero. [328]

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[324] No. 83-1038-Civ-T-13 (M.D. Fla. Sept. 6, 1985) (unpublished).

[325] 811 F.2d 609 (1987).

[326] 633 F.Supp. 1154 (W.D. Va. 1986).

[327] Id. at 1158.

The court distinguished Parden, and reasoned that because the state, in carrying out the traditional governmental function of operating a university, was compelled to use copyrighted works, the state's activities were analogous to the state activities in Edelman and Atascadero, cases in which waiver was not implied. [329] Thus, the court held that Virginia did not waive its Eleventh Amendment immunity, and was immune from the damages suit in federal court.

The Radford University case has been appealed to the U.S. Court of Appeals for the Fourth Circuit. [330]

In the most recent copyright/Eleventh Amendment opinion issued to date, BV Engineering v. UCLA, [331] the U.S. District Court for the Central District of California reluctantly concluded that the rationale of Mills Music could no longer be valid precedent in light of the Supreme Court's ruling in Atascadero. The case involved the alleged infringement by UCLA of seven of the plaintiff's copyrighted computer programs, and a request for damages pursuant to the Copyright Act of 1976.

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[328] Id. at 1157.

[329] Id. at 1160.

[330] Docket No. 87-1610.

[331] 657 F.Supp. 1246 (C.D. Cal. 1987).

The _BV Engineering_ court defined the issue at bar as whether Congress, in passing the federal copyright statutes pursuant to Article I, Section 8, Clause 8 of the Constitution, had exercised its power to create a cause of action for money damages enforceable against an unconsenting state in federal court.[332] The court assumed that the state did not impliedly waive its constitutional immunity, and expressly stated its agreement with the Seventh Circuit's analysis in the _McVey Trucking_[333] case that Congress may abrogate states' immunity to suit pursuant to _any_ of its plenary powers.[334] However, the court concluded that the statutory language of the Copyright Act of 1976 does not clearly express congressional intent to abrogate the states' sovereign immunity and, therefore, under the _Atascadero_ standard and recent Ninth Circuit cases interpreting that decision, the Copyright Act cannot be read to abrogate states' constitutional immunity from suit.[335]

The _BV Engineering_ case has been appealed to the Ninth Circuit.[336]

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[332] _Id._ at 1248.

[333] _See supra_ notes 267-270 and accompanying text.

[334] 657 F.Supp. at 1248.

[335] _Id._

[336] Docket No. 87-5920.

IV. CONCLUSION

The comments submitted in response to the Copyright Office's Request for Information document myriad concerns of copyright proprietors attempting to enforce their intellectual property rights against states and their entities, yet produce no evidence of proprietors engaging in unfair copyright or business practices. Owners are concerned with widespread copying, particularly in the important and increasingly lucrative area of state educational publishing. They caution that injunctive relief is inadequate -- damages are needed. And if states are not responsible for remunerating copyright owners, as are all other users subject to limited statutory exceptions, proprietors warn that: marketing to states will be restricted or even terminated; prices to other users will increase; and the economic incentive, even ability, to create works will be diminished. In short, copyright proprietors clearly demonstrate the potential for immediate harm to them.

However, it is still an unsettled question whether the Eleventh Amendment shields states from damage suits in federal courts for copyright infringement. Prior to the Supreme Court's 1985 decision in *Atascadero*, there was a split among the Circuit Courts of Appeal on the issue; since then, courts have uniformly held that states are immune. This holding, though, does not seem to be dictated by any judicial determination that Congress intended immunity for states or is powerless under its copyright clause power to bring states to bar, but instead flows from the *Atascadero* stricture that Congress express clearly in the language of the statute its intention to abrogate the Eleventh Amendment. 337/ Since the lower courts

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337. *See*, *e.g.*, *BV Engineering*, 657 F.Supp. at 1250, where the court

concluded that Congress did not clearly express such an intention in the language of the Copyright Act, they were compelled to find immunity.

With appeals pending before the Fourth and Ninth Circuits, the two-pronged *Atascadero* test for congressional abrogation of the Eleventh Amendment continues to be the standard to be applied in copyright cases. The *Atascadero* analysis requires judicial determination whether Congress has the authority to abrogate state immunity. The Supreme Court has not yet decided whether Congress has such authority pursuant to its Article I copyright clause power. If a court finds that Congress does have such authority, it must analyze the Copyright Act to determine whether Congress has clearly expressed its intention to abrogate immunity in the language of the statute. The court might also examine whether the states waived their immunity by using copyrighted works, although the requirement in *Atascadero* of an "unequivocal indication" that a state intends to consent to federal jurisdiction would make such a finding unlikely in most instances.[338] If

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stated:

> The Court is reluctant to reach the conclusion that *Mills Music* no longer obtains. Were the Court free to do so, it would hold otherwise, since it believes the view expressed by Judge (now Chief Justice) Lucas in the *Mills Music* case to be sound ... However ... the requirement that the congressional intent to abrogate a state's sovereign immunity must be 'express ... in the statutory language' was thrice stated, was specifically attacked in Justice Brennan's dissent, and was a concept borrowed from Justice Powell's dissenting opinion in *Hutto v. Finney*.... The chances of the new standard expressed in *Atascadero State Hospital* having been accidentally formulated or unintended to be taken literally are nonexistent.

[338] The Congressional Research Service Report entitled "Waiver of Eleventh Amendment Immunity From Suit: State Survey Relating to Copyright Infringement Claims," attached hereto as Appendix C, did not reveal a single state that, in its state constitution, state legislation, or state court decisions, has expressly consented to federal jurisdiction in copyright infringement cases.

courts determine that Congress has not abrogated state immunity in passing the Copyright Act, and that states have not waived their immunity, copyright owners are effectively remediless against infringing states until Congress amends the copyright law to rectify the situation.

With respect to the issue of Congress' authority to abrogate states' immunity pursuant to the copyright clause, the Supreme Court's resolution of the Union Gas litigation will ultimately influence the outcome of this inquiry. If the Supreme Court in Union Gas agrees with the Seventh and Third Circuit's position that Congress has the authority to abrogate the Eleventh Amendment pursuant to any of its plenary powers, then there would be no question that Congress has the authority to do so pursuant to the copyright clause, and the inquiry would shift to an examination of the language of the Copyright Act. On the other hand, if the Court finds that Congress does not have the power to abrogate state immunity pursuant to Article I, then states could not be brought into federal court for private individual damage actions for copyright infringement. If the Supreme Court narrowly limits its holding to Congress' Article I commerce clause power, the decision would support, but not decide, a similar copyright clause construction.

With respect to the issue of whether Congress in the Copyright Act of 1976 clearly expressed its intention to abrogate states' immunity, copyright owners contest the analysis of the courts that have decided the issue to date. In amici briefs in the Radford and BV Engineering appeals, they point to the Seventh Circuit's indication in McVey Trucking that it is proper to look to the statute as a whole in determining congressional intent in an Atascadero analysis. [339] They argue on this basis that the language of the Copyright Act as a whole indicates Congress' intent that states be liable in federal court for copyright infringement. [340] The Copyright Office agrees with this analysis.

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[339] 812 F.2d at 326 "[I]n seeking to construe a statute, we do not view

Congressional intent to subject states to damage suits in federal court can be found in the section 110 exemptions of certain acts of a governmental body, and the former manufacturing clause (former sections 601 and 602), which exempted certain actions by states. If Congress had not intended states to be subject to damage suits in federal court in abrogation of the Eleventh Amendment, Congress need not have included in the express words of the Copyright Act specific exemptions from copyright liability for certain state activities. The legislative history of the Copyright Act demonstrates that, in enacting the 1976 copyright statute, Congress specifically focused debate on the extent to which states and their agencies utilize copyrighted works and should be either liable for or exempt from infringement. [341]

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any provision in isolation. Rather, we seek to understand a given provision by determining how it fits into the larger statute of which it is a part").

[340] *See*, *e.g.*, Brief of Amici Curiae National Music Publishers' Ass'n, *et al.*, *Richard Anderson Photography, Inc. v. Radford Univ.*, No. 87-1610 at 15-23 (6th Cir. 1987) (Comment 12); Brief of Amici Curiae Association of Amer. Publishers, Inc., *et al.*, *BV Engineering v. UCLA*, No. 87-5920 at 12-17 (9th Cir. 1987); Brief of Amici Curiae National Music Publishers' Ass'n, *et al.*, *BV Engineering v. UCLA*, No. 87-5920 at 11-17 (9th Cir. 1987); Brief of Amici Curiae Columbia Pictures Industries Inc., *et al.*, *BV Engineering v. UCLA*, No. 87-5920 at 24-29 (9th Cir. 1987); *see also* Comment 21, National Music Publishers' Ass'n, *et al.*, at 22-29.

[341] *See*, *e.g.*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 168, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5702, 5784, 5696 (1976); *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 213 (1975); *Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 97-98 (1973); *Hearings on S. 597*

The unresolved legal issues concerning the Eleventh Amendment and the Copyright Act will be decided, or at least clarified in the courts. The Copyright Office is convinced that Congress intended to hold states responsible under the federal copyright law and that copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court. However, it remains unclear whether the *Atascadero* test for determining congressional intent to abrogate the Eleventh Amendment permits a court to look to a statute as a whole for determining such intent. If the Fourth and/or Ninth Circuits disagree with the *McVey* decision on that issue, they would have to find that the Copyright Act does not meet the *Atascadero* clear language test and, therefore, that states are immune from suit for damages in federal court for copyright infringement. If the outcome of the *Radford* and *BV Engineering* copyright litigation leaves open any possibility that states are immune from suit for damages in federal courts for copyright infringement, Congress should act quickly to amend the Act to ensure that states comply with the requirements of the copyright law.

Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 31, 625-27, 632-36, 991-96, 1003-1022, 1337-38 (1967); *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 459-464 (1965); *Copyright Law Revision, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, House Comm. on the Judiciary*, Part 3, 8th Cong., 2d Sess. 322-24 (1964); *House Comm. on the Judiciary, Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 129-30 (Comm. Print, July 1961). *See also* M. Nimmer, 3 *Nimmer on Copyright* §12.01[E] at 12-21 (1986).

The only issue that awaits determination is how Congress should amend the Copyright Act to accomplish that end. Based upon our legal analysis of the current status of Eleventh Amendment law, this Office recommends that, following the Supreme Court's resolution of the Union Gas litigation, Congress amend the Copyright Act as described below to ensure that copyright owners have an effective remedy against infringing states. Such legislative action would be unnecessary if the Union Gas decision clarifies that Congress has the authority to abrogate states' immunity pursuant to its Article I powers and the Fourth and Ninth Circuits agree that Congress so abrogated their immunity in the Copyright Act of 1976.

Recommendations

1. If Union Gas permits Article I abrogation, Congress should amend section 501 of the Copyright Act to clarify its intent to abrogate states' Eleventh Amendment immunity pursuant to its copyright clause power and thereby make states liable to suit for damages in federal court for copyright infringement. A legislative solution is preferred since this action would merely confirm Congress' original intent about the states' amenability to damage suits under the federal Copyright Act. Legislative action will also avoid needless litigation and delay in clarification of the copyright law.

2. If Union Gas does not permit congressional abrogation under Article 1 powers, Congress may be forced to amend the jurisdictional provision in 28 U.S.C. §1338(a), to provide that where states are

defendants private individuals may sue them in state court for copyright damages. 342/

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342. *See* Recent Development, *Copyright Infringement and the Eleventh Amendment: A Doctrine of Fair Use?*", 40 Vand. L. Rev. 225, 226-69 (1987).

APPENDIX A

Copyright Office Request for Information

ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

REQUEST FOR INFORMATION

REQUEST FOR INFORMATION, ELEVENTH AMENDMENT

The following excerpt is taken from Volume 52, Number 211 of the Federal Register for Monday, November 2, 1987 (pp.42045-42046)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RI 87-6]

Request for Information, Eleventh Amendment

AGENCY: Copyright Office, Library of Congress.

ACTION: Request for information.

SUMMARY: This Request for Information is issued to advise the public that the Copyright Office of the Library of Congress is investigating the issue of states' Eleventh Amendment immunity from suit for money damages in copyright infringement cases. The purpose of this notice is to elicit public comments, views, and information which will inform the Copyright Office as to (1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers, and (2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials. The Copyright Office also invites comment concerning the legal interpretation of Eleventh Amendment immunity in copyright infringement cases.

DATE: Comments should be received on or before February 1, 1988.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail, to: Office of the General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20559.

If delivered by hand, copies should be brought to: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room 407, First and Independence Avenues SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20559. Telephone: (202) 287-8380.

SUPPLEMENTARY INFORMATION: At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, the Copyright Office is conducting a study and preparing a report [1] on the issue of states' immunity from suit for money damages in copyright infringement cases.

The Copyright Act of 1976, Title 17 of the United States Code, grants copyright owners certain exclusive rights in their works. 17 U.S.C. 106. Although 28 U.S.C. 1338(a) grants Federal courts exclusive subject matter jurisdiction over cases concerning the Federal copyright law, the Eleventh Amendment to the Constitution generally prohibits Federal courts from entertaining suits brought by citizens of one state against another state. The question has arisen whether Congress, in enacting the Copyright Act of 1976 under the Copyright Clause of the Constitution, has subjected the states to copyright liability and overcome any claim of immunity under the Eleventh Amendment.[2]

In actual practice, most state agencies have traditionally recognized the rights of copyright owners and have paid royalties for their use of copyrighted works. At least eight state Attorneys General have issued opinions interpreting the Copyright Act to provide guidance for a state and its agencies.[3] This suggests that these states recognized their liability under the federal copyright statutes. However, a recent line of Federal court cases interpreting the application of states' Eleventh Amendment immunity in copyright infringement cases might influence states to change their practices of recognizing the rights of copyright owners. Applying recent Supreme Court decisions in Eleventh Amendment cases (not involving copyright law), Federal district courts in five states have found state governments immune from suit for money damages in copyright infringement lawsuits.[4]

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[1] This is not in any sense a rulemaking proceeding. The Office will, however, seek the widest possible public comment through this publication in the **Federal Register** and through other channels, such as associations representing state government and copyright interests.

[2] The same issue arose under the Copyright Act of 1909, Title 17 U.S.C. in effect through December 31, 1977, the Ninth Circuit in *Mills Music, Inc. v. State of Arizona*, 591 F.2d 1278 (9th Cir. 1979) held that states were not immune to copyright damage suits under the Eleventh Amendment, on the ground of the Copyright Clause. In this Request for Information we focus on the interpretation of the current Act because any cause of action against a state presumably arises under the Copyright Act of 1976, effective January 1, 1978.

[3] 107 Op. Att'y. Gen. Alas. (1983); 366 Inf. Op. Att'y Gen. Alas. 404 (1982); 187 Slip Op. Att'y Gen. Ariz. 106 (1986); 65 Op. Att'y Gen. Cal. 106 (1982); 64 Op. Att'y Gen. Cal. 186 (1981); 82 Op. Att'y Gen. Fla. 148 (1982); Slip. Op. Att'y Gen. Kan. 202 (1981); 84 Slip Op. Att'y Gen. La. 436 (1985); 82 Slip Op. Att'y Gen. La. 662 (1982); Slip Op. Att'y Gen. S.C. (1977); 82 Slip Op. Att'y Gen. Ut. 03 (1982).

Concern has been expressed about these cases because they appear to remove copyright owners' only pecuniary remedy against state governments that violate Federal copyright law. On the other hand, it is sometimes alleged that some copyright owners or their representatives may put undue pressure on state governments to pay for their uses of copyrighted works that might, in fact, be "fair use" under section 107 of the Copyright Act of 1976 or exempt under another provision of the Act.

By letter dated August 3, 1987, the Subcommittee requested that the Copyright Office completely assess the nature and extent of the clash between the Eleventh Amendment and Federal copyright law. As a part of this assessment, the Subcommittee specifically instructed the Office to conduct the following inquiries:

(1) An inquiry concerning the practical problems relative to the enforcement of copyright against state governments;

(2) An inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state governments with respect to copyright issues.

It is the purpose of this Request for Information to solicit public comments, views, and information which will inform the Copyright Office on these issues.

The Copyright Office also invites comments and arguments concerning the legal interpretation of Eleventh Amendment immunity in copyright infringement cases.

Dated: October 19, 1987.

Ralph Oman,
Register of Copyrights.

Approved:

William J. Welsh,
Acting Librarian of Congress.

[FR Doc. 87–25288 Filed 10–30–87; 8:45 am]

BILLING CODE 1410-07-M

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[4] See *BV Engineering v. Univ. of California, Los Angeles*, CV 86–4708, slip. op., 3 U.S.P.Q. 2d 1064 (D.C. Calif. April 17, 1987); *Mihaleck Corp. v. Michigan*, 595 F. Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds*, 814 F.2d 290 (6th Cir. 1987); *Cardinal Indus. v. Anderson Parrish Assoc.*, No. 85–1038–Civ–T–13 (M.D. Fla. Sept. 8, 1986), *aff'd* 811 F.2d 609 (11th Cir. 1987); *Richard Anderson Photography v. Rodford Univ.*, 633 F. Supp. 1154 (W.D. Va. 1986); *Woelffer v. Hoppy States of Am., Inc.*, 626 F. Supp. 499 (N.D. Ill. 1985).

Commentators in Copyright Office
Request for Information

Comment 1 - Law Offices of Alan Ruderman
Comment 2 - John C. Beiter
Comment 3 - Congressional Information Service, Inc.
Comment 4 - National Federation of Abstracting & Information Services
Comment 5 - The Foundation Press, Inc.
Comment 6 - Dun & Bradstreet, Inc.
Comment 7 - Commonwealth of Virginia, Office of the Attorney General
Comment 8 - Newsletter Association
Comment 9 - Intellectual Property Owners, Inc.
Comment 10 - Data Retrieval Corporation
Comment 11 - McGraw-Hill, Inc.
Comment 12 - Association of American Publishers, Inc. and Association of American University Presses, Inc.
Comment 13 - Harcourt Brace Jovanovich, Inc. (Peter Jovanovich)
Comment 14 - Cambridge Scientific Abstracts
Comment 15 - Lotus Development Corporation
Comment 16 - Motion Picture Assoc. of America, Inc.
Comment 17 - Harcourt Brace Jovanovich, Inc. (Richard Udell)
  Addenda:
  a. Holt, Rinehart and Winston, Inc.
     School Division (Bob Blevins)
  b. The Psychological Corporation
  c. Academic Press, Inc. (Stephen A. Dowling)
  d. Academic Press, Inc. (David Swanson)
  e. Harcourt Brace Jovanovich (Bill M. Barnett)
Comment 18 - Broadcast Music, Inc.
Comment 19 - West Publishing Company
Comment 20 - Erik G. Light
Comment 21 - The National Music Publishers' Association, Inc.; The Music Publishers' Association of the United States, Inc. and The Songwriters Guild of America
Comment 22 - Houghton Mifflin Company
Comment 23 - American Society of Composers, Authors and Publishers
Comment 24 - Inmagic, Inc.
Comment 25 - Dialog Information Services, Inc.
Comment 26 - American Journal of Nursing Company
Comment 27 - Information Industry Association
Comment 28 - International Business Machines Corporation
Comment 29 - F&W Publications, Inc.
Comment 30 - Houghton Mifflin Company (Charles A. Butts)
[Duplicate of Comment 22]
Comment 31 - American Intellectual Property Law Association
Comment 32 - Heesch & Kelly
Comment 33 - Holt, Rinehart and Winston, Inc. (David Dusthimer)
Comment 34 - DataTimes
Comment 35 - ADAPSO, The Computer Software and Services Industry Association
Comment 36 - Massachusetts Computer Software Council
Comment 37 - VU/Text Information Services, Inc.

Commentators in Copyright Office Request for Information (Cont'd.)

Comment 38 - National Association of Broadcasters
Comment 39 - SESAC, Inc. (Eugene L. Girden)
Comment 40 - Commonwealth of Massachusetts, Lisa A. Levy, Assistant Attorney General
Comment 41 - Information Handling Services
Comment 42 - SESAC, Inc. (John Koshel)
Comment 43 - The Regents of the University of California, Office of the General Counsel
Comment 44 - State Library of Pennsylvania

APPENDIX B

The English Common Law Concept of Sovereign Immunity

A. The Theory of Sovereign Immunity.

The genesis of modern sovereign immunity lies in twelfth [1] or thirteenth [2] century feudal England where there was no way of enforcing the law against the King. In the feudal scheme, each petty lord held his own court to settle disputes among his vassals. The vassals were subject to the court, but the lord was not unless he consented. In turn, the lord was subject to coercive suit only in his own lord's court and so on up to the King who sat at the apex of the pyramid and controlled all the courts. [3]

From his lofty perch, the King, in theory, could not be sued without his consent but his subjects still had remedies. The Crown could be sued in regular courts if the suit was not against the King as such, and when it was necessary to sue the Crown *eo nomine* consent was usually given. [4] During the fourteenth and fifteenth centuries, the petitions of grace and of right evolved: the former asked for relief as a favor from the sovereign, while the latter requested that the Crown recognize a right the petitioner would have if the claim were against anyone other than the King. [5] Often the King's officers could be sued for damages if a subject was the victim of illegal official action. [6]

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[1] *See* 1 F. Pollock & F. Maitland, *The History of English Law* 517-518 (2d ed. 1899).

[2] Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 2-3 (1972).

[3] *Id*. at 2.

[4] Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

In the mid-thirteenth century, the King could not be sued in his own name in his own courts. Because he was the chief landholder at a time when the terms "land-law" and "law of the land" were all but interchangeable, this caused problems with his subjects. The devices of petitions of right and coercive suits against officers and agencies were devised to provide relief against the government. [7] From the reign of Edward I on, there was a continuous parallel development of both types of action. Indeed, one commentator has concluded that throughout history the King, government and state have been suable, and that the question of requiring consent was determined by expediency rather than by any theory of whether the suit was really against the state. [8]

A petition of the King rather than a writ (a symbol of compulsion) was required because of the anomaly of the King compelling himself to do or refrain from doing something. [9] Yet the consensus of authority was that the sovereign was not above the law. [10] Ironically, the phrase "the King can do no wrong" meant at its inception exactly the opposite of what

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5. Note, *Rethinking Sovereign Immunity After Bivens*, N.Y.U. Law Rev. 597, 605 (1982) (citation omitted).

6. Jaffe, *supra* note 4, at 1.

7. *Id*. at 2-3.

8. *Id*. at 3.

9. 1 Pollock & Maitland, *supra* note 1, at 518.

10. 9 Holdsworth, *A History of English Law* 8 (3d ed. 1944); *see* Schulz, *Bracton on Kingship*, 60 Eng. Hist. Rev. 136, 165, 168 (1945).

it was later construed to mean. "[I]t meant that the King must not, was not allowed, not entitled, to do wrong...." [11] Though he could not be sued without his consent in his courts, the King nevertheless would endorse on petitions of right "let justice be done" permitting the courts to proceed. [12] Thus, assuming the existence of a right to be remedied, the petition was merely a courtesy to the King. The immunity of the sovereign from suit and his capacity to violate the law were two distinct concepts because the grant of consent was based on the assumption that the King had acted contrary to law. [13]

Later, the concept of sovereignty changed and immunity was premised on the idea that the King could not, in fact, do wrong. Thomas Hobbes and Jean Bodin established the school of thought that the King was the lawgiver appointed by God and was therefore above the indignity of suit by his subjects. [14] This shift in the perception of the King to that of spiritual sovereign corresponded with secular developments. The concentration of political, military, and economic power in the King's hands aided in the rise of the nation-state in the form of a monarchy. Spiritual and political developments "transformed the personal immunity of the King as an individual into an institutional immunity of crown and state ... mark[ing] the birth of the modern concept of sovereignty." [15]

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11. Ehrlich, No. XII: Proceedings Against the Crown (1216-1377) at 95, in 6 Oxford Studies in Social and Legal History (Vinogradoff ed. 1921).

12. Jaffe, *supra* note 4, at 4.

13. *Id.*

14. *See* J. Bodin, *Six Livres de la Republique* (4th ed. 1579) and T. Hobbes, *Leviathan* (1651).

15. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 Ford. L. Rev. 155, 159-60 (1981).

About one hundred years later, Blackstone would write that the King "is not only incapable of doing wrong, but even of thinking wrong." [16] This was not meant literally, instead the fiction was invoked that a wrong done in the King's name was not done by the King. [17] Blackstone's thinking was the impetus for the introduction of the monarchistic doctrine to the colonies.

B. Petition of Right.

Edward I wanted to be approachable, and opened his first parliament to complaints or requests. This spawned the practice of handling petitions, which were screened by special commissions, the Privy Council or the Chancellor. The Chancellor examined the petition for a "right" and if one was found endorsed the petition that right be done. Petitions which rested on a claim of right were tried on the facts by a commission or department, and if necessary sent for final legal determination to the Exchequer, Chancery, or King's Bench. [18]

Where the Crown's interests were involved a petition of right was the usual avenue for relief, although because the procedure was cumbersome simpler procedures, not requiring consent, were often used. For example, relief in some land title cases could be secured by monstrans de droit, without the consent of the Crown. Equity was also a source of relief, though Chancery gave the King certain procedural advantages and saddled

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16. 1 W. Blackstone, Commentaries on the Laws of England 246 (1765).

17. Id. at 238-39.

18. Jaffe, supra note 4, at 5.

claimants with additional burdens of disclosure and proof not required at law. [19] In one case Sir Francis Bacon argued that all suits against the King should be argued in Chancery where proper deference was accorded to the Crown. [20]

Toward the end of the seventeenth century, property claims against the state were tried in the Court of Exchequer. In one case, the Exchequer took jurisdiction over a mortgage suit against the Attorney General and awarded an equity of redemption. [21] However, only as a revenue court, [22] could it award such relief.

Earlier, the Exchequer had extended its jurisdiction to the King himself. [23] Charles II had made annuity grants out of hereditary revenues of the Crown, after he had closed the Exchequer and defaulted on his debts to some bankers. He defaulted a second time, and with the accession of William to the throne the bankers petitioned the Exchequer. The court held that the proceeding against Charles was proper. A majority of judges in the Exchequer Chamber agreed. The House of Lords unfortunately reversed the opinion, so the bankers were not paid their judgment, but a 1701 statute gave them a perpetual three percent annuity. [24]

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[19] Id. at 6.

[20] Case de Rege Inconsulto, 7 Bacon's Works 694 (Spedding Ed. 1879).

[21] Pawlett v. Attorney General, Hardres, 465, 145 Eng. Rep. 550 (Ex. 1668).

[22] Revenue courts exercised jurisdiction to determine claims arising in connection with the collection and expenditure of revenue, including claims against property taken by the Crown in satisfaction of taxes. Jaffe, supra note 4, at 7 (citations omitted).

[23] The Bankers Case (1697-1700).

[24] Appropriations of Revenue Act, 1701, 12 & 13 Will. 3, c. 12, §15 (repealed).

Until the 19th century, there were few additional cases concerning contract claims against the Crown. [25] Then in 1874, a petition of right was permitted for breach of a royal contract. [26] By this time, the question of consent was equated with the existence of a right against the Crown. [27] Moreover, a contemporary statute extended to courts of ordinary jurisdiction the authority to hear petitions of right. [28] However, the petition of right did not allow recovery against the King for the torts of a servant. [29] This limitation was based on the inapplicability of the doctrine of respondeat superior rather than any immunity of the crown to suit. Certainly if the King could not commit a tort none could be committed in his name, although suits were permitted against his officers.

C. Suits Against Officers.

The jurisprudence of suits against officers developed in parallel with the petition of right. The King's Exchequer, in the time of Henry III, could entertain private suits against lower level servants such as sheriffs and bailiffs, but the King could still claim the act as his own and insulate the officer from responsibility. Thus, even though an action lay against the servant, judgment could not be granted until the King disclaimed the act. [30] In 1275, Edward I introduced a statute permitting a writ of novel disseisin against the King's officers and requiring the payment of double damages if an officer was "attainted." [31] One whose land had been wrongfully seized in the King's name could recover possession by suing the officer. Similarly, sheriffs who had imprisoned a person for a felony without an indictment could be sued for false imprisonment. [32] The King's permission was still required, however, to sue officers outside the Exchequer though the privilege was gradually waived as to lower officers. [33]

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[25] Jaffe, supra note 4, at 8.

[26] Thomas v. The Queen, L.R. 10 Q.B. 31 (1874).

[27] United States v. O'Keefe, 78 U.S. (11 Wall.) 178 (1870) (suit in the Court of Claims by an English plaintiff was premised on showing that Americans had a similar right in England).

[28] Petitions of Right Act, 1860, 23 & 24 Vict. c. 34, §2 (repealed).

[29] Feather v. The Queen, 6 B. & S. 257, 295, 122 Eng. Rep. 1191, 1205 (Q.B. 1865).

Until the nineteenth century, most suits involved local officers. Those officials could be sued, without their consent, by criminal presentment or at common law before the Privy Council. In fact, damage actions so hindered governmental administration that a statute was introduced requiring a losing plaintiff in a suit against a Crown officer to "pay double costs." [34]

During the reign of the Tudors and Stuarts, the Crown attempted to control common law damage actions through the Privy Council. And during the reign of James I, a noted battle was fought between court and King for jurisdiction over the sewer commissions. The commissions maintained existing public drainage works and enforced liability for this maintenance.

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[30] Jaffe, supra note 4, at 9.

[31] Statute of Westminster 1, 1275, 3 Edw. 1, c. 24 (repealed).

[32] State of Westminster II, 1285, 13 Edw. 1, c. 13 (repealed).

[33] Jaffe, supra note 4, at 9.

[34] Public Officers Protection Act, 1609, 7 Jac. 1, c. 5 (repealed).

In the 1550's, the sewer commissioners considered draining the fens and using the land themselves for agricultural purposes. Not surprisingly, the local inhabitants of the fen country wanted sewage facilities and clashed with the commissioners, who had the support of the Privy Council. [35]

In Rooke's Case, [36] the court held that the discretion of the commissioners in levying assessments was "limited and bound with the rule of reason and law." [37] The Privy Council, at this time, acknowledged that questions of law arising in sewer administration were to be decided by judges, and in 1610, requested opinions on the legality of constructing new works [38] and tearing down certain landmarks. [39] The judiciary gave them two negative responses. [40]

Resenting their lack of authority, the commissioners of one county levied an assessment on a town and seized the cattle of a citizen in satisfaction of the whole amount of the assessment. He brought an action against the commissioners and was put in jail. The citizen obtained a writ of habeas corpus, and the commissioners who appeared to defend their action were fined and imprisoned for acting contrary to the holding in Rook's Case. [41] In 1616, the Privy Council passed an order prohibiting judicial interference with the sewer commissioners, yet reserved the right of

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35. Jaffe, supra note 4, at 10-11.

36. 5 Co. Rep. 99b, 77 Eng. Rep. 209 (C.P. 1599).

37. Id. at 100, 77 Eng. Rep. at 210.

38. Case of the Isle of Ely, 10 Co. Rep. 141a, 77 Eng. Rep. 1139 (C.P. 1611).

39. Case of Chester Mill, 10 Co. Rep. 137b, 77 Eng. Rep. 1134 (C.P. 1611).

40. Jaffe, supra note 4, at 10-11.

41. Id. at 12.

plaintiffs to file suits "if they receive not justice at the Commissioners' handes." [42]

The Privy Council extended its control over officials throughout the land. It attempted to form a system of administrative law separate from the common law and to escape entirely the control of the judiciary. But its success was only temporary: the Glorious Revolution extended traditional remedies available to citizens, the Star Chamber was abolished and the Council's power to punish persons for suing officers was taken away.[43]

Early actions against officers were usually for violations of rights of possession and liberty. Liability for postal incompetence, however, would not lie. In Lowe v. Cotton, [44] the King's Bench held that there was no liability for a Post Office employee's negligence in the loss of some Exchequer bills because the worker was a servant of the King, not the Postmaster.

There were few actions against high officers of state who functioned directly for the Crown in the conduct of government. [45] But a citizen was permitted to recover in trespass for the breaking into his house to search for seditious papers, even though the Earl of Halifax had caused a warrant to be issued. [46] The case stood for the proposition that a "thorough preliminary investigation" was required before a search warrant could be issued. [47]

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[42] Acts of the Privy Council, 1616-1617, at 57-58.

[43] Jaffe, supra note 4, at 13.

[44] 1 Raym. Ld. 646, 91 Eng. Rep. 1332 (K.B. 1701).

[45] Jaffe, supra note 4, at 15.

[46] Entick v. Carrington, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

Finally, some writs were permitted against Crown officers compelling them to perform or refrain from performing certain acts. The writ of mandamus was created [48] and the writ of certiorari expanded [49] in the first half of the seventeenth century. These remedies were more expansive than those at common law because a rich defendant was not required nor was any "good faith" defense available for officers. Certiorari was used to keep governmental actions within bounds, mandamus to compel the action of a government officer. [50]

Later, judges would occasionally compel the performance of certain ministerial duties. In Ellis v. Earl Grey, [51] the Court of Equity prevented the Lords of Treasury from paying certain office fees to anyone other than the plaintiff. In The Queen v. Lords Commissioners of the Treasury, [52] the court suggested that the Queen's Bench could not mandamus money from the Lords of the Treasury, as the latter were servants of the Crown, although mandamus was later granted in another case to refund overpaid income taxes. [53]

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47. Jaffe, supra note 4, at 16.

48. James Bagg's Case, 11 Co. Rep. 93b, 77 Eng. Rep. 1271 (C.P. 1615).

49. Commins v. Massam, March 196, 82 Eng. Rep. 473 (K.B. 1643).

50. Jaffe, supra note 4, at 16-17.

51. 6 Sim. 214, 58 Eng. Rep. 574 (1833).

52. L.R. 7 Q.B. 387 (1872).

53. The Queen v. Commissioners for Special Purposes of the Income Tax, 21 Q.B.D. 313 (C.A. 1888).

D. *Sovereign Immunity in Early America*.

The doctrine of sovereign immunity, born in common law England, quickly found fertile soil in the independent states of post revolutionary America. But the transition of the doctrine from monarchy to democracy was awkward. The constitutionalization of the doctrine, [54] the Eleventh Amendment, was narrower than its common law origins: the Eleventh Amendment generally prohibits suits against states in federal court; the common law version barred nonconsensual suit in any court regardless of the nature of the claim. [55] Another important difference was that sovereign immunity arose in a unitary system, where there was one sovereign and many citizens and the question was: could the ruling entity be sued by one of his citizens? By contrast, in the federal system in the United States, the problem involves the extent to which states may be subject to suit in the tribunal of another sovereign, one that is *more* than coequal. [56]

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54. *See, e.g.*, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984).

55. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 288 (Marshall, J., concurring) (1973).

> The common law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a State by one of its citizens, absent consent. But that doctrine was modified *pro tanto* in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including powers to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common law sovereignty which conflicted with those supreme powers given over to Congress.

56. Brown, *State Sovereignty Under the Burger Court - How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 Geo. L. J. 363, 369 (1985) (emphasis added).

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WAIVER OF ELEVENTH AMENDMENT IMMUNITY FROM SUIT: STATE SURVEY RELATING TO COPYRIGHT INFRINGEMENT CLAIMS

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ABSTRACT

The eleventh amendment to the United States Constitution establishes a bar to suits in federal court against any state by citizens of other states or by foreign governments and has been interpreted as barring suits against a state by individuals generally. However, the eleventh amendment defense is generally not available to a state when the state waives its immunity. This report focuses on state constitutions, state legislation, and state court decisions to determine waiver of immunity by each of the states.

SUMMARY

The eleventh amendment to the United States Constitution establishes a bar to suits in federal courts against any state by citizens of other states or by foreign governments and has been interpreted as barring suits against a state by individuals generally. The amendment specifies that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. 11. The eleventh amendment defense is generally not available to a defendant state in two situations: (1) when federal legislation evinces a congressional intent to create a private cause of action that is enforceable against a state in federal court; or (2) when the state waives its eleventh amendment protection. It is waiver of eleventh amendment immunity, and waiver of sovereign immunity, which is the focus of this report. Express state waiver is to be determined under state law. Since state governments seldom deal explicitly with the eleventh amendment, waiver of eleventh amendment immunity is generally the product of the federal courts' construction of state law. However a few states, Indiana, Nevada, and Pennsylvania, expressly direct that nothing contained in their statutes is to be construed as a waiver of eleventh amendment immunity.

Federal courts may discover state waiver of immunity in state constitutions, state legislation, or state court decisions. In our survey of the states, the constitutions of Alabama, Arkansas, and West Virginia address the immunity issue in the most restrictive manner. Those state constitutions direct that the states shall never be made defendant in any court of law or equity, which includes both federal and state courts. Twenty states constitutionally empower their state legislatures to specify the procedures and requirements for private suits against the state. These constitutional provisions generally do not waive eleventh amendment immunity or sovereign immunity absent additional legislation. Legislatures that authorize suits against their states have adopted various procedural and substantive restraints. Most restraints explicitly restrict suits against the state to certain state courts and to particular types of actions. These special tribunals and types of actions are indicated in the survey. Included in the survey are opinions issued by state Attorneys General which interpret the Copyright Act to provide guidance for a state and its agencies. The attorney general's authority to waive the state's immunity is usually lacking as many states have an antiwaiver policy in their constitutions or statutory provisions. The survey also indicates where states have waived sovereign immunity from tort and contract liability.

WAIVER OF ELEVENTH AMENDMENT IMMUNITY FROM SUIT: STATE SURVEY

The eleventh amendment to the United States Constitution establishes a bar to suits in federal courts against any state by citizens of other states or by foreign governments and has been interpreted as barring suits against a state by individuals generally. The amendment specifies that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. 11. The eleventh amendment defense is generally not available to a defendant state in two situations: (1) when federal legislation evinces a congressional intent to create a private cause of action that is enforceable against a state in federal court; or (2) when the state waives its eleventh amendment protection. See Note, Express Waiver of Eleventh Amendment Immunity, 17 Ga. L. Rev. 513, 522 (1983). For a discussion on congressional abrogation of eleventh amendment protection see Beiter, Copyright Infringement and the Eleventh Amendment: A Doctrine of Unfair Use, 40 Vand. 225 (1987); and Atascedero State Hospital v. Scanlon, 105 S.Ct. 3142, 3147 (1985), where the Supreme Court established the standards governing implicit waiver of eleventh amendment immunity by requiring Congress to specifically include states in the language of the statute when intending to subject the states to suit in federal court. It is waiver of eleventh amendment immunity, and waiver of sovereign immunity, which is the focus of this report. The analysis of the waiver of eleventh amendment immunity is guided by Edelman v. Jordan, 415 U.S. 651 (1974), where the Supreme Court stated that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." 415 U.S. at 673.

An alleged waiver of immunity is evaluated by the Edelman "most express language" standard. Express state waiver is to be determined under state law. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). Since state governments seldom deal explicitly with the eleventh amendment, waiver of eleventh amendment immunity is generally the product of the federal courts' construction of state law. However a few states, Indiana, Nevada, and Pennsylvania, expressly direct that nothing contained in their statutes is to be construed as a waiver of eleventh amendment immunity. These statutes preclude conclusively a finding of waiver of immunity to suit in federal court. See Gable v. Pennsylvania, 521 F. Supp. 43, 44 (E.D. Pa. 1981); O'Connor v. Nevada, 507 F. Supp. 546, 550 (D. Nev. 1981), aff'd, 686 F.2d 749 (1982). Federal courts may discover state waiver of immunity in state constitutions, state legislation, or state court decisions. In our survey of the states, the constitutions of Alabama, Arkansas, and West Virginia address the immunity issue in the most restrictive manner. Those state constitutions direct that the states shall never be made defendant in any court of law or equity, which includes both federal and state courts.

While state waiver of eleventh amendment immunity may not exist, a federal court hearing a diversity suit against a state must determine if the state's sovereign immunity--that immunity grounded in state constitutions or in state case law--shields the state from suit in state courts. If so, suit against the state is also barred in federal court. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); C. Wright, Law of Federal Courts § 46, at 275 (4th ed.

1983). However, lower courts have recently disagreed on the question of waiver of immunity in the copyright context. Compare Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979) (held states not immune to copyright damage suits under the Eleventh Amendment) with BV Engineering v. UCLA, 657 F.Supp. 1246 (C.D. Cal. 1987). Twenty states constitutionally empower their state legislatures to specify the procedures and requirements for private suits against the state. These constitutional provisions generally do not waive eleventh amendment immunity or sovereign immunity absent additional legislation. Legislatures that authorize suits against their states have adopted various procedural and substantive restraints. Most restraints explicitly restrict suits against the state to certain state courts and to particular types of actions. These special tribunals and types of actions are indicated in the survey. Included in the survey are opinions issued by state Attorneys General which interpret the Copyright Act to provide guidance for a state and its agencies. The attorney general's authority to waive the state's immunity is usually lacking as many states have an antiwaiver policy in their constitutions or statutory provisions. The survey also indicates where states have waived sovereign immunity from tort and contract liability.

Alabama

Ala. Const. art. 1, §14.

"The State of Alabama shall never be made defendant in any court of law or equity".

"The wall of governmental immunity is almost invincible and almost every conceivable type of action is within this constitutional prohibition." Hutchinson v. Bd. of Trustees of the Univ. of Ala., 256 So.2d 281 (1971).

"This constitutional section cannot be waived by the state and the legislature cannot consent to an action." Aland v. Graham, 250 So.2d 677 (1971).

Alaska

Alaska Const. art. 2, §21.

"Suits against the State. The legislature shall establish procedures for suits against the State."

"The State cannot be sued without its consent being expressly granted by legislative authority. The constitution of Alaska grants to the legislature the sole and exclusive power to enact laws establishing terms and conditions upon which the state may be sued." Alaska v. The O/S Lynn Kendall, 310 F. Supp. 433 (D. Alaska 1970).

Alaska Stat. §09.50.250.

The legislature waives immunity to suits asserting contract, quasi-contract, or tort claims exclusively. The right to sue the state is conditional upon compliance with provisions of administrative procedure. See Alaska Stat. §44.77.010.

Arizona

Ariz. Const. art. 4, pt. 2, §18.

"The legislature shall direct by law in what manner and in what courts suits may be brought against the State."

Ariz. Rev. Stat. Ann. §12-821 et seq.

The legislature authorizes tort and contract claims. See Ariz. Rev. Stat. Ann. §12-824 for procedural restrictions.

187 Slip Op. Att'y Gen. Ariz. 016 (1986).

The Attorney General concluded that it would not violate copyright laws for a local videotape rental store to donate the use of certain videotapes to a school district. As long as the district was simply showing or giving the videotapes to the students and not making copies of the videotapes, or charging students to view them, this would not constitute copyright infringement.

Arkansas

Ark. Const. art. 5, §20.

"The State of Arkansas shall never be made defendant in any of her courts."

This section expressly forbids all suits against the state and withholds consent, and nowhere is provision made whereby the immunity may be waived. Pitcock v. State, 121 S.W. 742 (1909); Ralls v. Mittlesteadt, 596 S.W.2d 349 (1980).

California

Cal. Const. art. 3, §5.

"Suits may be brought against the State and in such manner and in such courts as shall be directed by law."

Cal. Gov't. Code §940 et seq.

"A public entity may sue and be sued." Cal. Gov't. Code §945.

65 Op. Att'y Gen. Cal. 106 (1982).

The Attorney General concluded that the showing of videocassette tapes of motion pictures to prison inmates by state correctional authorities without authorization from the copyright owner constitutes an infringement of copyright. This opinion was based upon an earlier opinion which held that the state and state officials are subject to copyright laws. 64 Op. Att'y Gen. Cal. 186, 191 (1981).

71 Op. Att'y Gen. Cal 16 (1988).

The Attorney General concluded that the prior video recording by employees of the state Youth Authority of regularly broadcast television programs of copyrighted motion pictures and other audiovisual works for showing at a later time would not constitute an infringement of copyright laws. The showing of prerecorded store-bought or rented videocassettes of copyrighted motion pictures to institutionalized Youth Authority wards would constitute a copyright infringement.

Colorado

Colo. Rev. Stat. §24-10-101 et seq.

"The general assembly recognizes that the supreme court has abrogated the doctrine of sovereign immunity effective July 1, 1972, and that thereafter the doctrine shall be recognized only to such extent as may be provided by statute. It is recognized that the state, its political subdivisions, and public employees...should be liable for their actions ... only to such an extent and subject to such conditions as are provided by this article." Colo. Rev. Stat. §24-10-102.

Colo. Rev. Stat. §24-10-106.

This section provides for partial waiver of immunity for tort actions against the state.

Connecticut

Conn. Const. art. 11, §4.

"Claims against the State shall be resolved in such manner as may be provided by law."

Conn. Gen. Stat. §4-141 et seq.

This section provides authorization of actions against the state. The claims commissioner can grant permission to sue the state, and this grant constitutes a waiver of immunity if procedures are followed. The legislature, however, has authority to overrule commissioner's determinations.

Delaware

Del. Const. art. 1, §9.

"Suits may be brought against the State, according to such regulations as shall be made by law."

The constitution creates the doctrine of sovereign immunity and is an absolute bar to all suits unless by legislative act the General Assembly waives the immunity. Raughley v. Dept. of Health & Social Services, 274 A.2d 702 (1971); Jane Doe v. Cates, 499 A.2d 1175 (1985).

Del. Code Ann. tit. 18, §§6511 et seq.

These sections authorize tort and contract actions against the state. They waive immunity to suit to extent of liability insurance.

District of Columbia

D.C. Code Ann. §1-1188.1.

The sovereign immunity defense is not available for procurement practices.

D.C. Code Ann. §1-1201 et seq.

Claims against the District: these sections waive immunity for tort actions against government employees under specified circumstances.

Florida

Fla. Const. art. 10, §13.

"Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

The state constitution provides the Florida legislature with exclusive power to authorize suits against the state or its agencies. Davis v. Watson, 318 So. 2d 169 (1975). Under the Florida Constitution, waiver of eleventh amendment immunity can only occur by explicit act of the state legislature. Tuveson v. Florida Governor's Council on Indian Affairs, 734 F.2d 730 (11th Cir. 1984).

65 Op. Att'y Gen. Fla. 148 (1982).

"The question whether federal copyright protection subsists in a particular work is governed exclusively by federal law and is within the exclusive jurisdiction of the federal courts involving the construction of federal law. This office is therefore without the authority to make such a determination. Assuming for the purpose of this opinion that federal copyright protection does exist, copyrighted work made or received by a public agency in connection with its official duties or the transaction of its official business constitutes a public record within the purview of the Public Records Law, ch. 119, F.S., and in the absence of a specific statutory exemption or statute which makes the material confidential or absolute conflict with preemptive federal law on the subject, the public agency must permit access to such records for the purposes of inspection and examination pursuant to S. 119.07(1)(a), F.S. The public agency should not, however, reproduce or distribute, or permit the reproduction or distribution of, copies of the copyrighted work to the public without the express authorization of the copyright owner since such rights lie exclusively with the copyright owner, with certain statutory limitations, pursuant to the preemptive federal copyright law which is supreme and controls over state law to the extent of any conflict. Thus, with regard to reproducing, copying, and distributing copies of records protected under the federal copyright law, our Public Records Law must yield to the federal law on the subject to the extent of any conflict between Florida law and the federal statute. In short, agencies should not reproduce, or permit the reproduction of, or distribute copies of, copyrighted work to the public but may permit the public access to copyrighted work in their possession for examination and inspection purposes only."

Georgia

Ga. Const. art. 1, §2, ¶9.

This section waives sovereign immunity for contract actions against the state and to the extent the state is protected by liability insurance. Moreover, the sovereign immunity of the state may be waived further by Act of the General Assembly. "No waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments or agencies by the U.S. Constitution."

Ga. Code Ann. § 50-21-1.

This section provides for the waiver of sovereign immunity as to contract actions for which the state is a party.

Hawaii

Hawaii Rev. Stat. §§ 661-1 et seq.

These sections specify the procedures to be followed in actions against the state.

Hawaii Rev. Stat. § 662-2.

This section provides for the waiver of immunity for tort actions against the state.

Idaho

Idaho Code §§ 6-901 to 6-928.

These sections provide for the waiver of immunity for tort claims against the state and governmental entities.

Illinois

Ill. Const. art 13, § 4.

"Except as the General Assembly may provide by law, sovereign immunity in this state is abolished."

Only the General Assembly can determine when claims against the state will be allowed, and the legislature has determined that sovereign immunity is waived only when suits are brought pursuant to the Court of Claims Act. People v. Patrick Gorman, Inc., 444 N.E.2d 776 (1982).

Ill. Ann. Stat. ch. 37, § 439.1.

This section establishes the Courts of Claims and their procedures.

Indiana

Ind. Const. art. 4, § 24.

"Provision may be made, by general law, for bringing suit against the State; but no special law authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

Ind. Code §§ 34-4-16-1, -16.5-3.

Waiver of immunity for contract and tort liability.

Ind. Code §§ 34-4-16.5 et seq.

"Nothing in chapter shall be construed as a waiver of the eleventh amendment to the Constitution of the United States ..."

Iowa

Iowa Code §§ 25.1 et seq.

These sections describe the procedures to be followed in claims against the state. There is no waiver of immunity in the Iowa Code.

Kansas

Kan. Stat. Ann. §§ 46-907 et seq.

These sections provide for procedures to be followed for actions or claims against the state are specified in this section. Certain claims must be submitted to a joint committee on special claims against the state. A recommendation by the joint committee on special claims that an award be made shall not be construed as waiver of immunity. *See* Kan. Stat. Ann. § 46-919.

Kentucky

Ky. Const. § 231.

"The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

This section of the Constitution has limited the right to waive sovereign immunity to the General Assembly. Univ. of Louisville v. Martin, 574 S.W.2d 676 (1978).

Ky Rev. Stat. Ann. § 45A. 245(1).

This section provides for the waiver of immunity for contract liability.

Louisiana

La. Const. art. 12, § 10(A).

This section provides for the waiver of immunity in contract and tort actions against the state.

La. Const. art. 12, § 10(B).

"The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability."

La. Rev. Stat. Ann. § 13-5106A.

"No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." This section restricts actions against the state to state courts.

84 Op. Att'y Gen. La. 436 (1985).

The Attorney General concluded that the once per month showing of rented video cassettes to institutionalized juveniles and adults by the Department of

Corrections is permissible under federal copyright law.

Maine

Me. Rev. Stat. Ann. tit. 14 § 8103.

This section provides for the waiver of immunity for tort actions against the state.

Me. Rev. Stat. Ann. tit. 14 § 8113(1).

"Any immunity or other bar to a civil lawsuit under Maine or federal law shall, where applicable, remain in effect." Enactment of legislation is necessary if the state is to be taken as having shed immunity.

Maryland

Md. Const. art. 5, § 6

"It shall be the duty of the Clerk of the Court of Appeals and the Clerks of any intermediate courts of appeal, respectively, whenever a case shall be brought into said Courts, in which the state is a party or has interest, immediately to notify the Attorney General thereof."

Md. State Gov't. Code Ann. §§ 12-101, 12-201.

Waiver of immunity for certain tort and contract actions against the state.

Massachusetts

Mass. Gen. Laws Ann. ch. 258, § 1.

This section allows tort and contract claims against the Commonwealth.

Michigan

Mich. Comp. Laws Ann. §§ 600.6401 et seq.

Michigan Court of Claims Act. This Act describes the procedures for all actions against the state.

Mich. Comp. Laws Ann. § 691.1401.

This section partially waives immunity for tort actions against the state.

Minnesota

Minn. Stat. § 3.736(8).

"A state agency ... may procure insurance against liability of the agency and its employees for damages resulting from the torts of the agency and its employees. The procurement of this insurance constitutes a waiver of the defense of governmental immunity to the extent of the liability stated in the policy but has no effect on the liability of the agency and its employees beyond the coverage so provide. See also Cairl v. State, 323 N.W.2d 20 (1982).

Mississippi

Miss. Code Ann. § 11-45-1.

The state may be sued ... "after demand made of the auditor of public accounts ...." The section states that this chapter is not a waiver of immunity in federal courts.

Miss. Code Ann. § 11-46-5.

This section provides for waiver of immunity for tort actions against the state.

Missouri

Mo. Ann. Stat. §§ 537.600 et seq.

These sections state that sovereign immunity is in effect in Missouri. The one exception is the waiver of immunity for tort actions against the state.

Sections 537.600 et seq. which expressly waive the state's common law sovereign immunity from tort liability neither expressly nor impliedly waive Missouri's federal constitutional immunity from suit in federal court pursuant to the eleventh amendment. Complaint of Valley Towing, 581 F. Supp. 1287 (D.D.C. 1984).

Montana

Mont. Const. art. 2, § 18.

The state is subject to suit. "[N]o immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."

Mont. Code Ann. §§ 2-9-101 et seq.

These sections provide for partial waiver of immunity for tort actions against the state. A governmental entity is immune, however, from exemplary and punitive damages. See Mont. Code Ann. § 2-9-105.

Nebraska

Neb. Const. art. 5, § 22.

"The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."

Neb. Rev. Stat. § 24-319.

Actions against the state. This section covers all claims and demands on which the state may be sued.

This section is not self-executing. Legislative action is necessary to make it available. Gentry v. State, 118 N.W.2d 643 (1962); Vision Quest, Inc. v. State, 383 N.W. 2d 22 (1986).

New Hampshire

N.H. Rev. Stat. Ann. § 541-B:1-29.

This section describes the procedures to be followed in all actions and claims against the State of New Hampshire.

New Jersey

N.J. Stat. Ann. §§ 59:13-3, 59:1-1 et seq.

These sections waive immunity for certain contract and tort actions against the state.

New Mexico

N.M. Stat. Ann. § 42-11-1.

This section grants immunity to the state and its political subdivisions from any suit involving a claim of title or interest in real property except as specifically authorized by law.

New York

N.Y. Const. art. 6, § 18(b).

"The legislature may provide for the manner of trial of actions and proceedings involving claims against the state."

North Carolina

N.C. Gen. Stat. §§ 143-295 et seq.

These sections waive immunity for certain types of tort actions against the state.

North Dakota

N.D. Const. art. 1, § 9.

"Suits may be brought against the state in such manner, in such courts, and in such cases, and the legislative assembly may, by law, direct."

The power to modify or waive the states' immunity from suit is vested exclusively in the legislature. Singer v. Hulstrand Construction Co., 320 N.W.2d 507 (1982).

Ohio

Ohio Const. art. 1, § 16.

"Suits against the state. Suits may be brought against the state, in such courts and in such manner as may be provided by law."

Section 16, art. 1 requires legislative consent to a waiver of sovereign immunity. Hans v. Akron, 364 N.E.2d 1376 (1977).

Ohio Rev. Code Ann. § 2743.03.

This section establishes a special tribunal for all claims against the state. The section also waives immunity from liability for specific types of tort actions against the state.

Oklahoma

Okla. Stat. Ann. tit. 74, § 18g.

"Attorney General appearance in any matter in any court is not a waiver of immunity of the State of Oklahoma from being sued."

Oregon

Or. const. art. 4, § 24.

"Special acts authorizing suit against state prohibited."

Or. Rev. Stat. §§ 30.265, 30.320.

These sections waive immunity from liability for tort and contract actions or suits against the state.

Pennsylvania

Pa. Const. art. 1, § 11.

"Suits may be brought against Commonwealth in such manner, in such courts, and in such cases as the legislature by law directs."

The doctrine of sovereign immunity was abolished by the Pennsylvania Supreme Court. The constitutional section which grants power of consent to suit to the legislative branch, did not preclude the court from abrogating the doctrine. Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709 (1978).

Pa. Cons. Stat. § 2310.

The Pennsylvania General Assembly purported to overrule Mayle shortly after its announcement with the following legislation.

"Pursuant to section 11 of Article 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity."

Pa. Cons. Stat. § 8521(b).

"Nothing contained in this subchapter [concerning actions against Commonwealth parties] shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States."

Rhode Island

R.I. Gen. Laws § 9-31-1.

This section waives immunity for certain types of tort actions against the state.

South Carolina

S.C. Const. art. 17, § 2.

"The General Assembly may direct, by law, in what manner, and in what courts, suits may be brought against the state."

South Dakota

S.D. Const. art. 3, § 27.

"The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

S.D. Codified Laws Ann. §§ 21-32-15, -16.

These sections provide for waiver of immunity to the extent of liability coverage of the state.

S.D. Codified Laws Ann. §§ 21-32-2, -3, -17.

These sections provide for waiver of immunity to the extent of insurance coverage of the state.

S.D. Codified Laws Ann. §§ 4-9-2, 21-32-1 et seq.

These sections provide for the procedures to be followed in actions against the state.

Tennessee

Tenn. Const. art. 1, § 17.

"Suits may be brought against the State in such manner and in such courts as the legislature may by law direct."

A suit against the State of Tennessee is barred by Tennessee constitution art. 1, § 17 when it is not brought in a manner as the legislature directs. Chumbley v. State, 192 S.W.2d 1007 (1946).

Tenn. Code Ann. § 20-13-102.

This section provides that actions against the state are prohibited in state courts.

The rule of sovereign immunity in Tennessee is both constitutional and statutory. It is not within the power of the courts to amend it. Austin v. City of Memphis, 684 S.W.2d 624 (1984).

Texas

Tex. Civil Practice and Remedies Code § 107.002.

"Effect of Grant of Permission to Sue the State:

(a) A resolution that grants a person permission to sue the state ... is granted subject to the following conditions:

(ii) the State's sovereign immunity under the Eleventh Amendment to the United States Constitution is not waived;" (effective August 31, 1987).

Slip Op. Att'y Gen. Tx. (May 15, 1987).

The Attorney General concluded that the eleventh amendment would bar any damage action in federal court against the state, and to sue the State of Texas in state court would require permission to sue to be granted by the legislature.

"It is well established that to sue the State of Texas in Texas courts, permission to sue must be obtained from the legislature." Lowe v. Texas Tech. Univ., 540 S.W.2d 297 (1976); Thomson v. Baker, 388 S.W. 21 (1896); Texas-Mexican Ry. Co. v. Jarvis, 15 S.W. 1089 (1891).

Utah

Utah Code Ann. §§ 63-30-5 to -10, 63-30-16.

These sections waive immunity as to contract obligations, tort claims, and title to property claims.

Vermont

Vt. Stat. Ann. tit. 12, §§ 5601 et seq.

These sections provide for partial waiver of immunity from liability for tort actions against the state.

Vt. Stat. Ann. tit. 3, § 1103.

"Any representation of or payment of judgment against a state employee by the state not be deemed to waive the sovereign immunity of the state."

Virginia

Va. Code §§ 2.1-223.1 et seq.

"Claims against the State: Procedures. Immunity not waived by establishment of various insurance programs." See § 2.1-526.11.

Washington

Wash. Const. art. 2, § 26.

"The legislature shall direct by law, in what manner, and in what courts suits may be brought against the state."

West Virginia

W. Va. Const. art. 6, § 35.

"The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

"The policy which underlies sovereign immunity is to prevent the diversion of state moneys from legislatively appropriated purposes. Thus, where monetary relief is sought against the state treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit. In addition, the legislature may not waive immunity." Mellon-Stuart Co. v. Hall, 359 S.E.2d 124 (1987).

Wisconsin

Wis. Const. art. 4, § 27.

"The legislature shall direct by law, in what manner, and in what courts suits may be brought against the state."

Wyoming

Wyo. Const. art. 1, § 8.

"Suits may be brought against the state in such manner and in such courts as the legislature may by law direct."

No suit against the state until the legislature makes provision for such filing and absent such consent, no suit may be made. Bisear v. University of Wyoming Bd. of Trustees, 605 P.2d 374 (1980).

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